

EXHIBIT 4

C26TCAPA
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
CAPITOL RECORDS, LLC,

Plaintiff,

v.

12 CV 95 (RJS)

REDIGI INC.,

Defendant.
-----x

New York, N.Y.
February 6, 2012
3:30 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN, LIEBOWITZ & LATMAN
Attorneys for Plaintiff
BY: RICHARD MANDEL
JONATHAN KING

RAY BECKERMAN, PC
Attorneys for Defendant
BY: RAY BECKERMAN
M. TY ROGERS

SOUTHERN DISTRICT REPORTERS, P.C.
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C26TCAPA

1 you look at fair use, their whole defense on fair use basically
2 presupposes that we're challenging just the mere act of
3 storage.

4 THE COURT: That's my question to you. So if someone
5 just decided to store digital recordings that they purchased
6 through iTunes, they wanted to store it in a cloud, that
7 requires copying, according to your papers. Right?

8 MR. MANDEL: Yes. And that's not what we're
9 challenging here.

10 THE COURT: But why not? So what is the difference
11 between what is going on here that you are challenging and the
12 hypothetical I just supposed?

13 MR. MANDEL: Because what is really going on, what
14 their entire Web site talks about, their Facebook page,
15 everything, is a resale market, the ability not to store it,
16 but to sell it. It's stored in the cloud for the purpose of
17 resale.

18 THE COURT: But well, it's stored in the cloud, and
19 the process of storage requires a copying. And that process
20 you're saying -- I think you're conceding is not a violation of
21 the Copyright Act.

22 MR. MANDEL: For purposes of this case, we're not
23 making that claim. We're not challenging that. What we're
24 saying is that you can't subdivide what they're doing. And
25 they're really saying essentially user A starts out, and he can

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Apple to Launch iCloud on October 12

Breakthrough Set of Free Cloud Services Includes iTunes in the Cloud, Photo Stream & Documents in the Cloud

CUPERTINO, California—October 4, 2011—Apple® today announced that iCloud®, a breakthrough set of free cloud services, including iTunes® in the Cloud, Photo Stream and Documents in the Cloud, that work seamlessly with your iPhone®, iPad®, iPod touch®, Mac® or PC to automatically and wirelessly store your content in iCloud and push it to all your devices, will be available on October 12. iCloud stores your music, photos, apps, contacts, calendars, documents and more, keeping them up to date across all your devices. When content changes on one device, all your other devices are updated automatically and wirelessly.

"iCloud is the easiest way to manage your content, because iCloud does it all for you and goes far beyond anything available today," said Eddy Cue, Apple's senior vice president of Internet Software and Services. "You don't have to think about syncing your devices, because it happens automatically, and it is free."

iTunes in the Cloud lets you automatically download new music purchases to all your devices, so you can buy a song on your iPad and find it waiting for you on your iPhone—no syncing required. iTunes in the Cloud also lets you download your previously purchased iTunes content, including music and TV shows to your devices at no additional cost.* Since iCloud stores your previously purchased iTunes history, you can see what you've bought no matter which device you bought it on, and since you already own the content, you can play it on your devices or simply tap the iCloud icon to download it to store and play later.

In addition, iTunes Match™ scans the songs in your music library, including music not purchased on iTunes, and matches them to the more than 20 million songs available on the iTunes Store®, offering them in high-quality, DRM-free 256 kbps AAC encoding. Any unmatched songs are uploaded to iCloud so you can play songs, albums or playlists from your music library on your devices.

iCloud's innovative Photo Stream service lets you take a photo on one device and have it automatically appear on your other devices. A photo you take on your iPhone is sent to iCloud and automatically pushed to your iPad, iPod touch, Mac or PC. You can even view your Photo Stream album on your Apple TV®. iCloud also automatically pushes a copy of the photos you've imported from your digital camera over Wi-Fi or Ethernet, so you can view them on your other devices. iCloud manages your Photo Stream efficiently, showing your last 1000 photos so you don't run out of storage space.

iCloud's Documents in the Cloud keeps your documents up to date across all your devices, automatically, so you don't have to. For example, if you create a document using Pages® on your iPad, that document is automatically sent to iCloud. When you use Pages on another iOS device, you can open the same document with your latest changes and pick up editing or reading right where you left off. Apple's iWork® apps for iOS, Pages, Numbers® and Keynote® will take advantage of iCloud storage, and Apple is also offering developers the APIs they need to enable their apps to work seamlessly with Documents in the Cloud.

iCloud lets you see your App Store™ and iBookstore™ purchase history and download those apps and books to any of your devices at any time. Purchased apps and books can be automatically downloaded to your devices, not just the device they were purchased on. Simply tap the iCloud icon and download your purchased apps and books to any of your iOS devices at no additional cost.

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plug it in, everything is backed up quickly and efficiently. iCloud already stores your purchased music, TV shows, apps, books and Photo Stream; iCloud Backup takes care of everything else, backing up your photos and video in the Camera Roll, device settings, app data, home screen and app organization, messages and ringtones. iCloud Backup can even help you set up a new iOS device or restore the information on one you already own.**

iCloud works seamlessly with your Contacts, Calendar and Mail, so you can share calendars with friends and family, and your ad-free Mail account is hosted at me.com. Your inboxes and folders are kept up to date across your iOS devices and computers, and with icloud.com you have easy web access to your Mail, Contacts, Calendar, Find My iPhone and iWork documents.

The Find My iPhone app can help you if one of your devices is missing. Just use the free Find My iPhone app on another device, or sign in at icloud.com from a computer to see your missing iPhone, iPad or iPod touch on a map, display a message, and remotely lock or wipe your missing device. Find My iPhone now lets you locate a missing Mac running OS X Lion.

Find My Friends is a new app available as a free download from the App Store that lets you easily share your location with people who are important to you. Friends and family appear on a map so you can quickly see where they are. Find My Friends also lets you temporarily share your location with a group of friends, whether it's for a couple of hours for a dinner or a couple of days on a camping trip; when the time is up, the sharing ends. With Find My Friends, you get a notification every time you get a new friend request and if you give them permission, they can see your location. With a simple tap you can hide your location. Parental controls help you manage how your child uses Find My Friends.

iCloud will be available concurrently with iOS 5, the world's most advanced mobile operating system, which includes over 200 new features including Notification Center, an innovative way to easily view and manage notifications in one place without interruption; iMessage™, a new messaging service that lets you easily send text messages, photos and videos between all iOS 5 users; and Newsstand, a new way to purchase and organize your newspaper and magazine subscriptions.

Pricing & Availability

iCloud will be available on October 12 as a free download to iPhone, iPad or iPod touch users running iOS 5 or a Mac running OS X Lion with a valid Apple ID. iCloud includes 5GB of free cloud storage for Mail, Document Storage and Backup. Purchased music, TV shows, apps, books and Photo Stream do not count against the storage limit. iTunes Match will be available starting in the US later this month for \$24.99 a year. Using iCloud with a PC requires Windows Vista or Windows 7; Outlook 2010 or 2007 is recommended for accessing contacts and calendars. Additional iCloud storage upgrades are available to purchase starting at \$20 a year for 10GB, \$40 a year for 20GB and \$100 a year for 50GB.

iOS 5 will be available as a free software update for iPhone 4S, iPhone 4, iPhone 3GS, iPad 2, iPad and iPod touch (third and fourth generation) customers, allowing them to experience the amazing new features.

*iCloud is available worldwide. iTunes in the Cloud varies by country. iTunes Match and TV shows are US-only. iTunes in the Cloud and iTunes Match may be used on up to 10 devices with the same Apple ID.

**Backup of purchased music is not available in all countries. Backup of purchased TV shows is US only. A purchased item may be unavailable to be restored if it is no longer in the iTunes Store, App Store or iBookstore.

Apple designs Macs, the best personal computers in the world, along with OS X, iLife, iWork and professional software. Apple leads the digital music revolution with its iPods and iTunes online store. Apple has reinvented the mobile phone with its revolutionary iPhone and App Store, and has recently introduced iPad 2 which is defining the future of mobile media and computing devices.

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iCloud

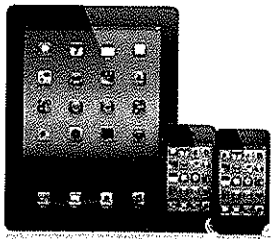
Overview

Features

How to Set Up

Set up iCloud on all your devices. The rest is automatic.

To get the most out of iCloud, make sure to set it up on your iPad, iPhone, iPod touch, Mac, and PC.



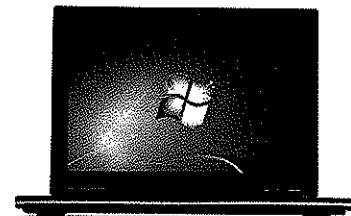
**For iPad, iPhone,
and iPod touch**

Set up now



For Mac

Set up now



For PC

Set up now



Set up iCloud on your Apple TV.

It's easy to get iCloud on your Apple TV. Just turn on Apple TV and enter your Apple ID. You can get access to your Photo Stream, iTunes Match and any movies and TV shows you've purchased on your iPhone, iPad, iPod touch, Mac or PC.

Automatic downloads and downloading previous purchases require iOS 4.3.3 or later on iPhone 3GS or later, iPod touch (3rd and 4th generation), or iPad; iOS 5 on iPhone 4 (CDMA model); or a Mac or PC with iTunes 10.3.1 or later. Previous purchases may be unavailable if they are no longer in the iTunes Store, App Store, or iBookstore. Downloading previous movie purchases requires iTunes 10.6, iOS 5 or later, or Apple TV software 4.3 or later. Not all previously purchased movies are available for downloading to your other devices. Download iTunes 10.6 free.

iCloud requires iOS 5 on iPhone 3GS or later, iPod touch (3rd and 4th generation), or iPad; a Mac computer with OS X Lion; or a PC with Windows Vista or Windows 7 (Outlook 2007 or 2010 or an up-to-date browser is required for accessing email, contacts, and calendars). Some features require a Wi-Fi connection. Some features are not available in all countries. Access to some services is limited to 10 devices.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CAPITOL RECORDS, LLC

Plaintiff,

v.

No. 12 Civ. 0095 (RJS)

REDIGI INC.,

Defendant.
-----X

RULE 30(b)(6)
DEPOSITION OF LAWRENCE S. RUDOLPH ROGEL
New York, New York
Monday, June 18, 2012

Reported by:

ANNETTE ARLEQUIN, CCR, RPR
JOB NO. 50449

<p style="text-align: right;">Page 2</p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5 June 18, 2012</p> <p>6 10:00 a.m.</p> <p>7</p> <p>8 Rule 30(b)(6) deposition of REDIGI</p> <p>9 INC., through its representative LAWRENCE</p> <p>10 S. RUDOLPH ROGEL, held at the offices of</p> <p>11 Cowan, Liebowitz & Latman, P.C., 1133</p> <p>12 Avenue of the Americas, New York, New York</p> <p>13 pursuant to Rule 30(b)(6) Notice and</p> <p>14 individually, before Annette Arlequin, a</p> <p>15 Certified Court Reporter, a Registered</p> <p>16 Professional Reporter, a Certified LiveNote</p> <p>17 Reporter, and a Notary Public of the State</p> <p>18 of New York.</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 3</p> <p>1</p> <p>2 APPEARANCES:</p> <p>3</p> <p>4 COWAN, LIEBOWITZ & LATMAN</p> <p>5 Attorneys for Plaintiff</p> <p>6 1133 Avenue of the Americas</p> <p>7 New York, New York</p> <p>8 BY: JONATHAN Z. KING, ESQ.</p> <p>9</p> <p>10</p> <p>11 MEISTER SEELIG & FEIN</p> <p>12 Attorneys for Defendant</p> <p>13 140 East 45th Street</p> <p>14 New York, New York 10017</p> <p>15 BY: GARY ADELMAN, ESQ.</p> <p>16</p> <p>17 ALSO PRESENT:</p> <p>18 JOHN OSSENMACHER, ReDigi, Inc.</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 4</p> <p>1</p> <p>2 IT IS HEREBY STIPULATED AND AGREED by</p> <p>3 and between the attorneys for the</p> <p>4 respective parties herein, that filing and</p> <p>5 sealing be and the same are hereby waived;</p> <p>6 IT IS FURTHER STIPULATED AND AGREED</p> <p>7 that all objections, except as to the form</p> <p>8 of the question, shall be reserved to the</p> <p>9 time of the trial;</p> <p>10 IT IS FURTHER STIPULATED AND AGREED</p> <p>11 that the within deposition may be sworn to</p> <p>12 and signed before any officer authorized to</p> <p>13 administer an oath, with the same force and</p> <p>14 effect as if signed and sworn to before the</p> <p>15 Court.</p> <p>16</p> <p>17 - o0o -</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 L. Rudolph</p> <p>2 LAWRENCE S. RUDOLPH ROGEL,</p> <p>3 called as a witness, having been duly</p> <p>4 sworn by a Notary Public, was examined</p> <p>5 and testified as follows:</p> <p>6 * * *</p> <p>7 EXAMINATION BY</p> <p>8 MR. KING:</p> <p>9 Q. Good morning, Mr. Rudolph, or should</p> <p>10 I call you Mr. Rogel?</p> <p>11 A. Call me Rudolph.</p> <p>12 Q. Okay. Mr. Rudolph. My name is</p> <p>13 Jonathan King. We met before. I represent</p> <p>14 Capitol Records along with my firm Cowan</p> <p>15 Liebowitz & Latman and we're here to take your</p> <p>16 deposition today.</p> <p>17 You'll be appearing both in your</p> <p>18 personal capacity as Mr. Rudolph and also as a</p> <p>19 corporate designee on behalf of ReDigi Inc. and</p> <p>20 we'll be asking you some questions.</p> <p>21 I gather you've probably been deposed</p> <p>22 before, but I always like to just set out the</p> <p>23 ground rules.</p> <p>24 I'll ask you questions and you are to</p> <p>25 provide me answers to the best of your ability.</p>

<p style="text-align: right;">Page 10</p> <p>1 L. Rudolph 2 hardware, which meant it was covered by -- it 3 was contract agreement. If it was part of 4 hardware, then Broward County already paid for 5 it. It's -- I can't remember the details, but 6 it was a question of whether microcode was 7 hardware or software. 8 Q. Okay. And you also rendered an 9 expert report in that case? 10 A. I wrote an expert report. I don't 11 know if it was submitted. I think it was 12 arbitrated before it was over. 13 Q. Okay. Do you know how the case was 14 resolved? 15 A. I think there was an -- I think it 16 went to arbitration and as usual, I think there 17 was, there was some split on the money as to who 18 had to pay what. 19 Q. And how about the case where you 20 testified as an expert? 21 A. The other case was HP versus Gateway. 22 Q. I've heard of those guys. 23 And who retained you in that case? 24 A. I think it was -- it will come to me 25 in a second. A very large law firm in</p>	<p style="text-align: right;">Page 11</p> <p>1 L. Rudolph 2 California. DLA Piper. 3 Q. Okay. And whom were they 4 representing? 5 A. HP. 6 Q. Okay. 7 A. And this was copyright. This was 8 patent infringement on, again, something to do 9 with the microprocessor, and I was deposed and, 10 again, they settled before an expert was -- 11 report was written. 12 Q. And did you render an expert report in 13 that case? 14 A. No. 15 Q. Okay. And I assume you 16 participated -- your resumé references about a 17 dozen cases in which you participated as an 18 expert? 19 A. Correct. 20 Q. But these are the only two instances 21 in which you've actually testified, the ones 22 you've just described to me? 23 A. Correct. 24 Q. Okay. Do you know whether you've 25 ever had any of your expert reports stricken or</p>
<p style="text-align: right;">Page 12</p> <p>1 L. Rudolph 2 commented on by a judge? 3 A. Never. 4 Q. That was a poor question. 5 So no judicial opinion has ever made 6 reference to any of your expert reports; is that 7 correct? 8 A. As far as I know, that's correct. 9 Q. Okay. Has anyone ever moved to 10 exclude one of your expert reports? 11 A. Never. 12 Q. You understand that ReDigi has -- the 13 company, the defendant in this lawsuit, has 14 identified you to testify on its behalf as to a 15 number of deposition topics? 16 A. Yes. 17 MR. KING: Gary, should we just do 18 this through counsel just put on the record 19 which topics Mr. Rudolph will be speaking 20 to? 21 MR. ADELMAN: Yes. 22 MR. KING: Okay. So why don't we 23 mark this as Plaintiff's Exhibit No. 1. 24 (Plaintiff's Exhibit 1, 30(b)(6) 25 Notice, marked for identification, as of</p>	<p style="text-align: right;">Page 13</p> <p>1 L. Rudolph 2 this date.) 3 MR. KING: And it may be just faster 4 to do this with you. 5 Based on our correspondence, Gary, I 6 understand that Mr. Rudolph will be 7 testifying as to topics 1 jointly with 8 Mr. Ossenmacher -- 9 MR. ADELMAN: Correct. 10 MR. KING: -- two jointly with 11 Mr. Ossenmacher. 12 MR. ADELMAN: Correct. 13 MR. KING: Three, six jointly with 14 Mr. Ossenmacher. 15 MR. ADELMAN: Both correct. 16 MR. KING: Fourteen. 17 MR. ADELMAN: Correct. 18 MR. KING: Fifteen? 19 MR. ADELMAN: Correct. 20 MR. KING: Sixteen jointly with 21 Mr. Ossenmacher. 22 MR. ADELMAN: Correct. 23 MR. KING: And eighteen, that also 24 may be done with Mr. Ossenmacher. I'm not 25 sure.</p>

<p style="text-align: right;">Page 30</p> <p>1 L. Rudolph</p> <p>2 MR. KING: You can just object.</p> <p>3 MR. ADELMAN: Okay. I think -- you</p> <p>4 know, if you could just rephrase.</p> <p>5 BY MR. KING:</p> <p>6 Q. Was it either your idea or</p> <p>7 Mr. Ossenmacher's idea to develop ReDigi into a</p> <p>8 for profit company?</p> <p>9 A. It was a joint idea between the two</p> <p>10 of us. I've been in the area of writing</p> <p>11 patents, writing papers and there's -- I think</p> <p>12 as you say, that by -- when two people work</p> <p>13 together and think about alternatives and</p> <p>14 discuss those, it's a joint idea.</p> <p>15 Q. Okay. Who came up with the name</p> <p>16 ReDigi?</p> <p>17 A. I do not recall.</p> <p>18 Q. And what does ReDigi stand for?</p> <p>19 A. Recycled digital goods.</p> <p>20 Q. Okay. And that name is meant to</p> <p>21 capture the fact that ReDigi involves the sale</p> <p>22 and purchase of what ReDigi calls used or</p> <p>23 recycled digital media?</p> <p>24 MR. ADELMAN: Objection to form.</p> <p>25 But you can answer.</p>	<p style="text-align: right;">Page 31</p> <p>1 L. Rudolph</p> <p>2 A. It's to capture the idea of recycled,</p> <p>3 pre-owned digital goods.</p> <p>4 Q. So when you and Mr. Ossenmacher had</p> <p>5 this idea of a marketplace for buying and</p> <p>6 selling used or recycled digital goods, what</p> <p>7 were your first steps in implementing that idea?</p> <p>8 A. The first step, the basic step was to</p> <p>9 figure out how we can identify the difference</p> <p>10 between a legally acquired digital good versus</p> <p>11 illegally acquired digital good.</p> <p>12 It was our belief from the outset</p> <p>13 that a marketplace would only work where the</p> <p>14 goods would be legally acquired. We wanted to</p> <p>15 make sure that we could distinguish between the</p> <p>16 two.</p> <p>17 Q. So then did you seek to develop a</p> <p>18 technology that permitted you to achieve the</p> <p>19 goal that you just described?</p> <p>20 A. I developed the technology that</p> <p>21 attempts to -- that looks at a digital file and</p> <p>22 defines whether it's legally acquired or not.</p> <p>23 Q. And you're the computer programmer</p> <p>24 who wrote the software code that achieves that</p> <p>25 goal?</p>
<p style="text-align: right;">Page 32</p> <p>1 L. Rudolph</p> <p>2 A. I'm the computer architect that</p> <p>3 pretty much decided how we would be doing that.</p> <p>4 Q. And once you developed technology to</p> <p>5 achieve that first goal of identifying whether a</p> <p>6 digital file was legally acquired, what's the</p> <p>7 next technological step in implementing this</p> <p>8 idea of a used digital marketplace?</p> <p>9 A. The next step was to figure out how</p> <p>10 one can transfer ownership of a digital file</p> <p>11 from one user to another without actually --</p> <p>12 without ever having the point of time when two</p> <p>13 people, the buyer and seller, both own the song</p> <p>14 at the same time, they own both the digital good</p> <p>15 at the same time.</p> <p>16 Q. Okay. So did you write software code</p> <p>17 that you believe achieves that goal?</p> <p>18 A. Correct.</p> <p>19 Q. And did you seek patent protection</p> <p>20 for these technologies?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. Because I know your</p> <p>23 declaration that you submitted in your</p> <p>24 summary -- not summary judgment, the preliminary</p> <p>25 junction motion made reference to a patent</p>	<p style="text-align: right;">Page 33</p> <p>1 L. Rudolph</p> <p>2 application, correct?</p> <p>3 A. Correct. It's -- I was extremely</p> <p>4 excited about this notion that we can do a</p> <p>5 transaction in the cloud to be able to transfer</p> <p>6 ownership from one user to another.</p> <p>7 I'm going to be -- I'm answering the</p> <p>8 minimum information, but I don't know, I had 10</p> <p>9 or 15 good ideas in my life and this is one of</p> <p>10 them.</p> <p>11 Q. And the patent that you filed, and we</p> <p>12 can take a look at it, the patent that you filed</p> <p>13 is your wish that it covered both the</p> <p>14 verification that the legal -- that the file was</p> <p>15 legally acquired and covered your technology for</p> <p>16 the transfer as you described it just a moment</p> <p>17 ago?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Let me take a look at the</p> <p>20 patent.</p> <p>21 MR. ADELMAN: Before we go on, I just</p> <p>22 wanted -- we forgot at the beginning, I</p> <p>23 wanted to just verify the last depositions</p> <p>24 were designated attorneys' eyes only for</p> <p>25 the review period, for our review period</p>

<p style="text-align: right;">Page 50</p> <p>1 L. Rudolph</p> <p>2 In the case of ReDigi, would that be</p> <p>3 what you colloquially call the ReDigi cloud?</p> <p>4 A. Yes, it is.</p> <p>5 Q. Okay. And a cloud, just for my</p> <p>6 edification, a cloud is essentially a remote</p> <p>7 server, right, at least for purposes of this, a</p> <p>8 simple description?</p> <p>9 A. Sure. Yes.</p> <p>10 Q. Okay. And it is located, it's not up</p> <p>11 in the clouds, it is located in a physical</p> <p>12 location, correct?</p> <p>13 A. Correct.</p> <p>14 Q. Is --</p> <p>15 A. Arizona.</p> <p>16 Q. Where is yours?</p> <p>17 A. I don't know but...</p> <p>18 Q. Is yours in Cambridge, Massachusetts?</p> <p>19 Is ReDigi's in Cambridge?</p> <p>20 A. No, it's not.</p> <p>21 Q. Where is it located?</p> <p>22 A. We're using the Amazon cloud service.</p> <p>23 Q. Okay.</p> <p>24 A. Which is probably in Arizona</p> <p>25 somewhere.</p>	<p style="text-align: right;">Page 51</p> <p>1 L. Rudolph</p> <p>2 Q. So you're renting server space from</p> <p>3 Amazon?</p> <p>4 A. That is correct.</p> <p>5 Q. Okay. And as the patent paragraph 70</p> <p>6 says, it says that remote server, which we've</p> <p>7 now identified as the ReDigi cloud, that's the</p> <p>8 cloud where ReDigi users can store their music</p> <p>9 files, correct?</p> <p>10 A. That is correct.</p> <p>11 Q. Okay. Now on item -- on Figure</p> <p>12 No. 2, the server also has various icons or</p> <p>13 discs attached to it.</p> <p>14 Are those discs meant to represent</p> <p>15 the physical storage space that's made available</p> <p>16 via that server?</p> <p>17 A. That is correct.</p> <p>18 Q. Okay. And that again is a physical</p> <p>19 storage entity on which computer files can be</p> <p>20 stored?</p> <p>21 A. Eventually.</p> <p>22 Q. Is that also, you think, probably</p> <p>23 located in Arizona?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And so music files, when a</p>
<p style="text-align: right;">Page 52</p> <p>1 L. Rudolph</p> <p>2 ReDigi user stores music in the ReDigi cloud, he</p> <p>3 or she is most likely storing on a physical disc</p> <p>4 in Arizona or wherever the rented Amazon cloud</p> <p>5 server space is, correct?</p> <p>6 A. Correct.</p> <p>7 Q. And from that disc, that physical</p> <p>8 disc, the ReDigi user can stream the file back</p> <p>9 to himself, correct?</p> <p>10 A. Correct.</p> <p>11 Q. He could also download the file back</p> <p>12 to his computer, correct?</p> <p>13 A. He can download a file from the</p> <p>14 computer, yes.</p> <p>15 Q. Okay. And now that same disclosure</p> <p>16 we just read also made reference to a client</p> <p>17 digital data processor, e.g. a private computer,</p> <p>18 and that would be item No. 22 in Figure No. 2?</p> <p>19 A. Correct.</p> <p>20 Q. Okay. So the way it works is the</p> <p>21 ReDigi user has the music file on item No. 22 in</p> <p>22 Figure 2 and then uploads that music file via</p> <p>23 the Internet, shown in the icon for 26, to the</p> <p>24 remote server in item 20, which is the ReDigi</p> <p>25 cloud server, correct?</p>	<p style="text-align: right;">Page 53</p> <p>1 L. Rudolph</p> <p>2 A. Correct.</p> <p>3 Q. And then if you continue in paragraph</p> <p>4 -- I'll point you. If you go back to page 4</p> <p>5 which is ReDigi00000419, Plaintiff's Exhibit 2,</p> <p>6 it says, this is maybe three-quarters of the way</p> <p>7 down the paragraph, it says "The user, a term</p> <p>8 which is typically used herein to refer to an</p> <p>9 act of the client digital data processor --</p> <p>10 A. Wait. I lost you. Where are you?</p> <p>11 I'm sorry.</p> <p>12 Q. Okay. I'm still in paragraph 70,</p> <p>13 maybe about halfway down.</p> <p>14 A. The second sentence?</p> <p>15 Q. It starts -- no, it's about --</p> <p>16 A. The second --</p> <p>17 Q. It starts -- it's after a long</p> <p>18 parenthetical and it starts with the term, "The</p> <p>19 user."</p> <p>20 A. Oh, okay, yes.</p> <p>21 Q. "The user..." I'll skip the</p> <p>22 parenthetical, "...may upload or download his or</p> <p>23 her DMOs between his or her private computer and</p> <p>24 his or her storage area on the remote server."</p> <p>25 Okay. So when the patent refers to</p>

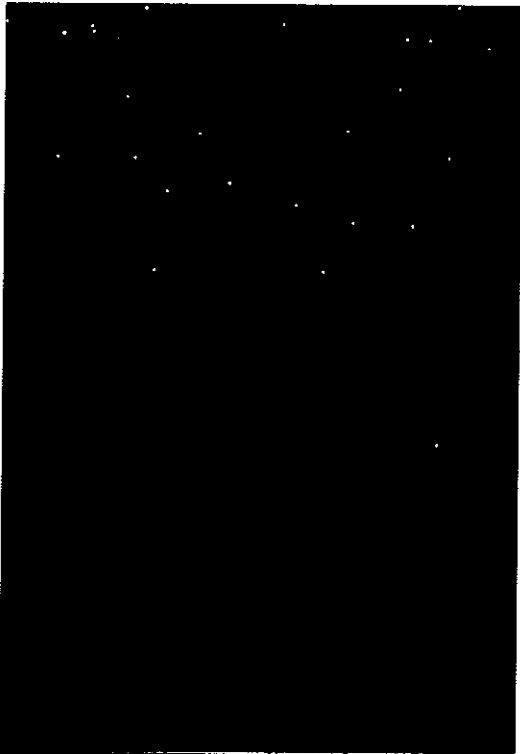
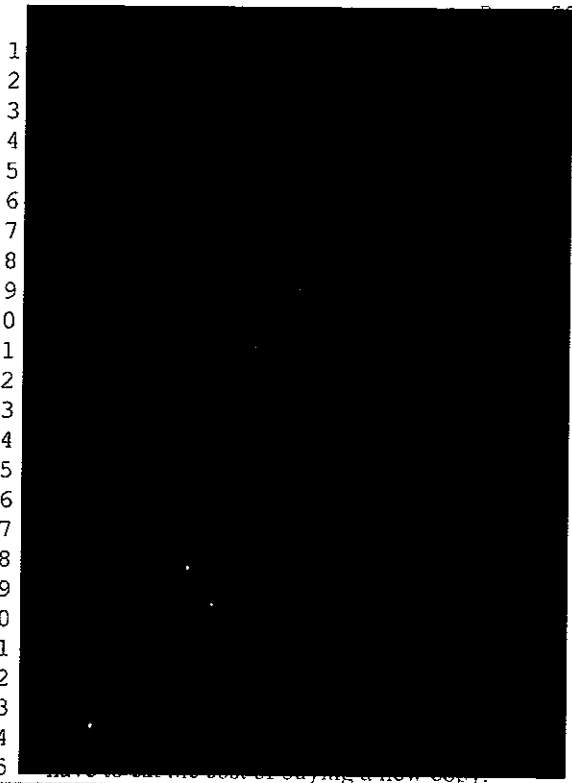
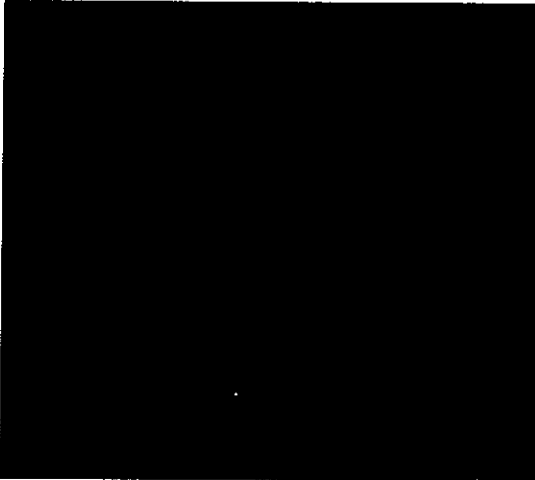
<p style="text-align: right;">Page 54</p> <p>1 L. Rudolph</p> <p>2 the "storage area on the remote server," in the</p> <p>3 case of ReDigi, would that be what ReDigi refers</p> <p>4 to as the user's cloud locker?</p> <p>5 A. Yes. We talk about the user -- the</p> <p>6 user's ReDigi cloud locker is on the disc</p> <p>7 system, yes.</p> <p>8 Q. Right. And that means, at least in</p> <p>9 virtual terms that means that space on the disc</p> <p>10 that stores the files associated with that</p> <p>11 particular user, correct?</p> <p>12 A. Correct.</p> <p>13 Q. Okay. And again, the references in</p> <p>14 the patent to DMO, digital media object, in the</p> <p>15 case of ReDigi would mean music files, song</p> <p>16 files, right?</p> <p>17 A. That is correct.</p> <p>18 Q. So the file, the music file first</p> <p>19 resides in the ReDigi server as described in</p> <p>20 this patent application, the file first resides</p> <p>21 on the private user's computer, on a physical</p> <p>22 disc on that private user's computer, correct?</p> <p>23 A. Perhaps.</p> <p>24 Q. Okay. Or in one, in one variation.</p> <p>25 I've got my private computer at home and I've</p>	<p style="text-align: right;">Page 55</p> <p>1 L. Rudolph</p> <p>2 got all my iTunes files stored on my hard drive.</p> <p>3 That's certainly a plausible scenario, correct?</p> <p>4 MR. ADELMAN: Objection. I'm not</p> <p>5 clear whether you're talking about what the</p> <p>6 patent says or what actually is happening</p> <p>7 on --</p> <p>8 MR. KING: Well, we're going to --</p> <p>9 MR. ADELMAN: So are you just talking</p> <p>10 about the patent right now?</p> <p>11 MR. KING: I'll make it clear.</p> <p>12 BY MR. KING:</p> <p>13 Q. So let's talk about the ReDigi</p> <p>14 service and then describe it in the terms of</p> <p>15 this patent.</p> <p>16 I'm a ReDigi user and I have a song</p> <p>17 on my hard drive. That song is stored on my</p> <p>18 hard drive on a physical disc, correct?</p> <p>19 A. That's a plausible scenario.</p> <p>20 Q. Okay. I upload it to the -- I became</p> <p>21 a ReDigi member, I download the software, my</p> <p>22 file is deemed eligible, I upload it to the</p> <p>23 ReDigi cloud server.</p> <p>24 Now that song is stored on a physical</p> <p>25 disc somewhere wherever the ReDigi cloud server</p>
<p style="text-align: right;">Page 56</p> <p>1 L. Rudolph</p> <p>2 is located, correct?</p> <p>3 A. At the end of the transfer, yes.</p> <p>4 That's correct.</p> <p>5 Q. And either from -- and I can play it</p> <p>6 when it's on my home computer, I can stream it</p> <p>7 to myself, correct?</p> <p>8 A. No.</p> <p>9 Q. Or I can play it, I can perform it.</p> <p>10 A. No.</p> <p>11 Q. I can't?</p> <p>12 If I have an iTunes file on my home</p> <p>13 computer, I can't click it and play it through</p> <p>14 my speakers?</p> <p>15 A. If you just loaded --</p> <p>16 Q. I'm saying before uploading.</p> <p>17 A. Okay.</p> <p>18 Q. Can I?</p> <p>19 A. Yes, I presume so.</p> <p>20 Q. And then if I upload it to the ReDigi</p> <p>21 cloud also from that remote disc on which it's</p> <p>22 now embodied, I can also play it back to myself,</p> <p>23 correct?</p> <p>24 A. That is correct.</p> <p>25 Q. Now I refer you to paragraph 71 on</p>	<p style="text-align: right;">Page 57</p> <p>1 L. Rudolph</p> <p>2 page 4 of Plaintiff's Exhibit 2, which is again</p> <p>3 ReDigi 419. It says, "For a DMO..." it's again</p> <p>4 a digital media object "...to be offered for</p> <p>5 sale, is it first copied to the remote server</p> <p>6 and stored on the disc."</p> <p>7 So is that the case in the ReDigi</p> <p>8 system, that for a, in the case of a ReDigi, a</p> <p>9 music file to be offered for sale, it is first</p> <p>10 copied to the remote server, the ReDigi cloud</p> <p>11 server and stored on a disc?</p> <p>12 A. No.</p> <p>13 Q. So that statement in here in</p> <p>14 paragraph 71 does not describe what happens in</p> <p>15 the ReDigi service?</p> <p>16 A. Correct, it does not describe</p> <p>17 accurately what happens in the ReDigi service.</p> <p>18 Q. Okay. What is inaccurate about that</p> <p>19 statement as it applies to ReDigi?</p> <p>20 A. ReDigi doesn't copy the file from the</p> <p>21 user's machine up to the locker. We transfer</p> <p>22 the file so that when the file has migrated,</p> <p>23 transferred from the user machine to the locker,</p> <p>24 it's no longer on the user machine. There's</p> <p>25 never the case that there are two copies, two</p>

1 L. Rudolph
2 instances of the file both on the user machine
3 and the locker.

4 Q. Right. I understand it's never the
5 case that there are -- well, strike that.

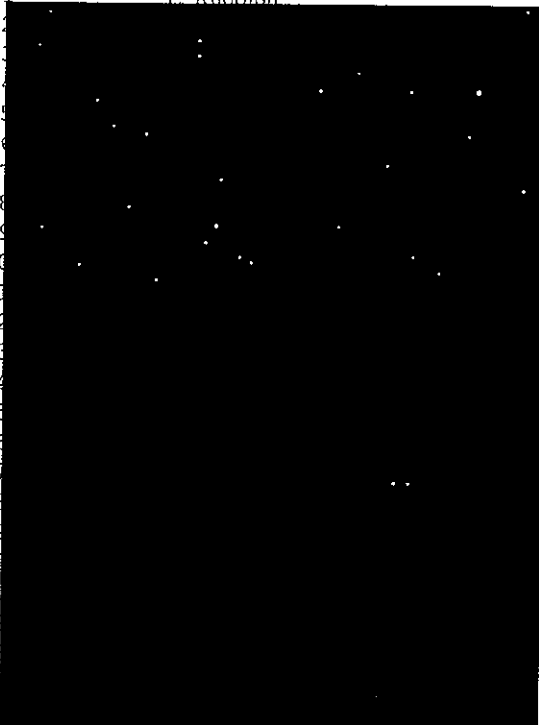
6 Has ReDigi invented a new method for
7 uploading files?

8 A. ReDigi hasn't invented a new method,
9 but we use non-standard methods.



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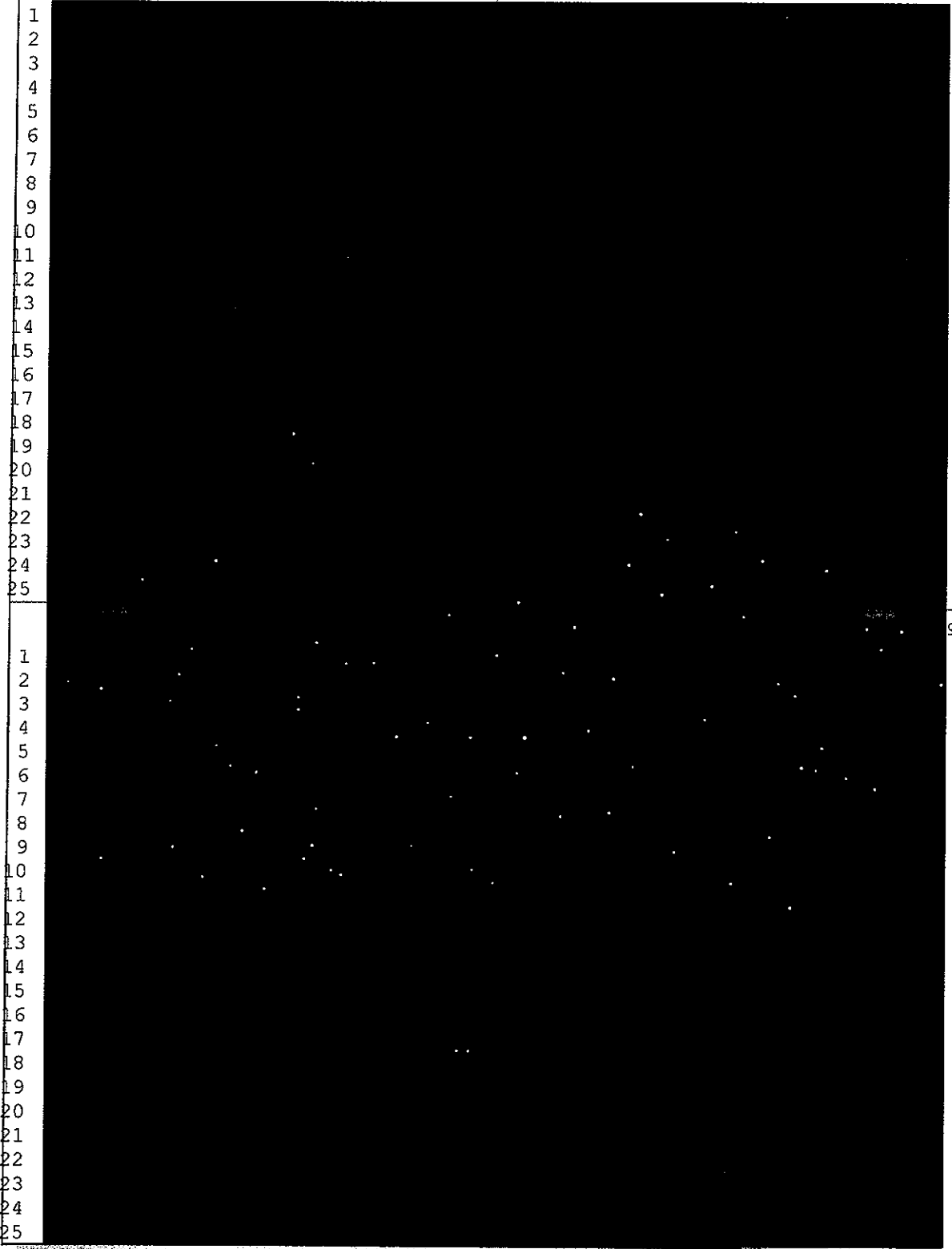
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Do you have contractual arrangements with either Apple or Google that permit you to do this?

A. No, we do not.

Q. Okay.

MR. ADELMAN: Objection to form.

Q. Now with respect to -- let's talk about Apple iCloud's service.

Am I correct that the way that service works is once you purchase a song, it's

L. Rudolph

automatically -- it can be set to automatically download it to all of your devices, correct?

A. I don't know if that's -- it's all your devices. I don't know exactly. It's pretty complicated.

MR. ADELMAN: Can we take a two-minute break?

MR. KING: Sure.

(Recess is taken.)

(Plaintiff's Exhibit 4, Printout from iTunes website describing iCloud service, marked for identification, as of this date.)

BY MR. KING:

Q. Okay. We were discussing Apple's iCloud service, and if you turn to the second page of what we -- well, first of all, I'll represent to you that what I've placed in front of you is Plaintiff's Exhibit 4. It's just a printout from the iTunes website describing its iCloud service.

And if you'll turn to the second page of this document --

MR. ADELMAN: You know what, Jon, I

L. Rudolph

think I have yours. You gave me two copies.

(Handing.)

BY MR. KING:

Q. If you'll turn to the second page of this document, you'll see it says, "Buy here, automatically get it everywhere"?

A. Yes.

Q. It says, "With iTunes in the cloud, the music you download to one device automatically appears on all your devices. So the song you buy from your Mac at work is ready and waiting for you on your iPod when it's time to drive home. iTunes will automatically download your new songs, apps, books to your other devices over Wi-Fi or a cellular network."

And then I'll refer you to the first page of this document.

A. Um-hmm.

Q. "What's new in iTunes." It states, "As part of iCloud, iTunes in the cloud takes what you buy on iTunes on one device and pushes it to all your other devices wirelessly and without syncing."

L. Rudolph

Are you familiar with that service that iTunes provides of automatically wirelessly downloading all your iTunes purchases to all your devices?

A. I can't answer that question because you're asking me to draw a conclusion which I don't agree with. I mean this is marketing bullshit.

I'm sorry. I'm sorry. I didn't mean to say that. This is marketing. It does not push it to all your devices. I can't agree with that. It doesn't push it to your iTune, to your iPad for example.

Q. Right.

So it pushes it to your devices that are wireless enabled, correct?

A. That's right and the statements like "to all your devices" is not correct.


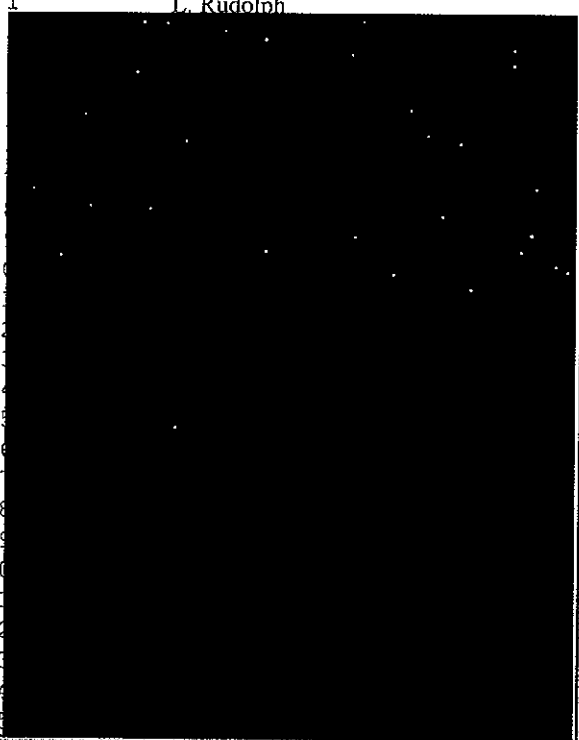
Q. Okay. Do you agree, though, that as currently constituted, the iCloud service pushes an iTune purchase to all your devices that are wireless enabled, like an iPod touch, for example?

A. I am saying I read those words and I

Page 146	Page 147
<p>1 L. Rudolph</p> <p>2 Q. ReDigi00000339. It says,</p> <p>3 "Congratulations to seller. ReDigi has fulfilled</p> <p>4 your order."</p> <p>5 So I gather this is the email someone</p> <p>6 would get when ReDigi has located someone who</p> <p>7 has the file that has been ordered and is able</p> <p>8 to process the sale?</p> <p>9 A. This is the email one gets when a</p> <p>10 song has been offered for sale for which there</p> <p>11 is an outstanding order and we've done a match.</p> <p>12 Q. Okay. And this is a notification</p> <p>13 that the orderer receives that a match has been</p> <p>14 found?</p> <p>15 A. No. This is the email that one</p> <p>16 receives that the transaction is completed.</p> <p>17 Q. Okay. So now the orderer has</p> <p>18 officially purchased the song, correct?</p> <p>19 A. That is correct.</p> <p>20 Q. Okay. And Plaintiff's Exhibit 10</p> <p>21 tells the purchaser that that purchaser can keep</p> <p>22 the song in your cloud or go download it to your</p> <p>23 computer at any time. Those options are both</p> <p>24 available to that purchaser, correct?</p> <p>25 A. That is correct.</p>	<p>1 L. Rudolph</p> <p>2 MR. KING: I think this exhibit has</p> <p>3 too many pages in it but we'll mark this</p> <p>4 11.</p> <p>5 (Plaintiff's Exhibit 11, Email from</p> <p>6 customer service to Larry at ReDigi, marked</p> <p>7 for identification, as of this date.)</p> <p>8 BY MR. KING:</p> <p>9 Q. And I'll really just focus your</p> <p>10 attention on the first page of Plaintiff's</p> <p>11 Exhibit 11. Some other things are attached to</p> <p>12 it that are redundant of what we've already</p> <p>13 discussed.</p> <p>14 This is an email from customer</p> <p>15 service to Larry at ReDigi.</p> <p>16 Are you Larry at ReDigi?</p> <p>17 A. Yes, I am.</p> <p>18 Q. And the subject of this email is "Low</p> <p>19 on Credit."</p> <p>20 Does ReDigi notify its users when</p> <p>21 they are low on credit?</p> <p>22 A. Periodically, yes, it does.</p> <p>23 Q. Why?</p> <p>24 A. We would like people to add more</p> <p>25 credit, either buying it or getting more credit</p>
Page 148	Page 149
<p>1 L. Rudolph</p> <p>2 by purchasing credit from us.</p> <p>3 Q. And they can, and they can increase</p> <p>4 the amount of credit they have either with money</p> <p>5 or by obtaining credit by uploading songs?</p> <p>6 A. Not by uploading -- they can increase</p> <p>7 their credit by either selling songs or by</p> <p>8 charging to their credit card.</p> <p>9 Q. Okay. The reason you want them to</p> <p>10 have credit is to encourage them to go buy</p> <p>11 songs, correct?</p> <p>12 A. That is correct.</p> <p>13 Q. And also you want them to increase</p> <p>14 the credit in their account by uploading songs</p> <p>15 and offering them for sale as well, right?</p> <p>16 MR. ADELMAN: Objection to form.</p> <p>17 BY MR. KING:</p> <p>18 Q. Because that's one way to increase</p> <p>19 the credit in your account?</p> <p>20 A. Yes, that's one way of increasing the</p> <p>21 account.</p> <p>22 Q. And that stimulates the marketplace</p> <p>23 activity that you'd like ReDigi to encourage,</p> <p>24 correct?</p> <p>25 THE VIDEOGRAPHER: Object to the</p>	<p>1 L. Rudolph</p> <p>2 form.</p> <p>3 You can answer.</p> <p>4 A. Yes.</p> <p>5 Q. In your preliminary injunction</p> <p>6 declaration you described various ways in which</p> <p>7 a user could have committed a, quote, unquote,</p> <p>8 violation which may or may not result in a</p> <p>9 suspension of their account.</p> <p>10 Can you describe for me the</p> <p>11 circumstances that would lead to a user</p> <p>12 committing a violation?</p> <p>13 A. A violation is when a song is offered</p> <p>14 for sale or has been sold and we discover a copy</p> <p>15 of that song on the user's machine. We call it</p> <p>16 a violation.</p> <p>17 Q. Okay. And is that only when the user</p> <p>18 offers the song for sale or has just merely</p> <p>19 uploaded it to the cloud?</p> <p>20 A. We've changed the system now. It's</p> <p>21 only when they offer a song for sale or sold.</p> <p>22 Q. Okay. So if I've uploaded the song</p> <p>23 to the cloud but haven't offered it for sale and</p> <p>24 I'm a ReDigi user, it won't be deemed a</p> <p>25 violation if you determine that I have other</p>

Page 178	Page 179
<p>1 L. Rudolph</p> <p>2 A. What's the question?</p> <p>3 Q. Under the terms of service, RDO could</p> <p>4 terminate your authorization to use the RDO</p> <p>5 content for any reason, right?</p> <p>6 MR. ADELMAN: Asked and answered.</p> <p>7 Calls for a legal conclusion.</p> <p>8 You may answer.</p> <p>9 A. That's what it says here, yes.</p> <p>10 Q. Okay. So ReDigi had no legal basis</p> <p>11 to complain for RDO's termination of the API</p> <p>12 access, did it?</p> <p>13 MR. ADELMAN: Calls for a legal</p> <p>14 conclusion. Objection.</p> <p>15 You can answer if you know.</p> <p>16 A. I have no idea if we had legal basis</p> <p>17 for it.</p> <p>18 Q. And you're aware that your attorney</p> <p>19 wrote a letter to court over the weekend</p> <p>20 threatening an injunction against Capitol</p> <p>21 Records because of the termination of your RDO</p> <p>22 agreement?</p> <p>23 A. Yes, I do.</p> <p>24 Q. Okay. And what was the legal basis</p> <p>25 for threatening Capitol with an injunction?</p>	<p>1 L. Rudolph</p> <p>2 MR. ADELMAN: Objection. Calls for a</p> <p>3 legal conclusion.</p> <p>4 You may answer.</p> <p>5 A. Yeah, I'm not gonna -- I don't know</p> <p>6 what the legal basis is.</p> <p>7 Q. Because there was none, right?</p> <p>8 MR. ADELMAN: Objection.</p> <p>9 Argumentative.</p> <p>10 A. I said I don't know if there's a</p> <p>11 legal basis or not.</p> <p>12 Q. Right.</p> <p>13 So ReDigi threatened Capitol with an</p> <p>14 injunction without knowing whether it had any</p> <p>15 legal basis to do so.</p> <p>16 A. I didn't say that --</p> <p>17 MR. ADELMAN: Objection.</p> <p>18 Argumentative.</p> <p>19 BY MR. KING:</p> <p>20 Q. Is that correct?</p> <p>21 A. I'm not a lawyer. I don't know what</p> <p>22 the legal basis is or not. I don't want to</p> <p>23 be -- I don't know. I don't want to make legal</p> <p>24 conclusions. I'm not a lawyer.</p> <p>25 Q. Has ReDigi followed up with RDO to</p>
Page 180	Page 181
<p>1 L. Rudolph</p> <p>2 pursue any claim against RDO for terminating its</p> <p>3 API access?</p> <p>4 MR. ADELMAN: Objection.</p> <p>5 You can answer.</p> <p>6 Objection to form.</p> <p>7 A. Not that I know of.</p> <p>8 Q. Does ReDigi intend to pursue any</p> <p>9 claim against RDO for terminating its API</p> <p>10 access?</p> <p>11 MR. ADELMAN: Objection.</p> <p>12 You can answer.</p> <p>13 A. We make that decision every day. I</p> <p>14 don't know. I can't tell you what we're going</p> <p>15 to do tomorrow.</p> <p>16 Q. And does ReDigi -- we've heard no</p> <p>17 further since February on this when</p> <p>18 Mr. Beckman's request was rejected by the judge,</p> <p>19 but does ReDigi intend to pursue any claims in</p> <p>20 this action, the lawsuit that brings us here</p> <p>21 today, regarding the termination of the RDO</p> <p>22 access?</p> <p>23 MR. ADELMAN: Objection.</p> <p>24 First, I don't know who "we" is, and</p> <p>25 secondly, it's undefined and secondly it</p>	<p>1 L. Rudolph</p> <p>2 calls for a legal conclusion and it's</p> <p>3 subject to attorney-client privilege.</p> <p>4 At this point instruct my client not</p> <p>5 to answer.</p> <p>6 BY MR. KING:</p> <p>7 Q. Do you believe ReDigi has any basis</p> <p>8 for making a claim against Capitol regarding the</p> <p>9 termination of the RDO access?</p> <p>10 MR. ADELMAN: Calls for a legal</p> <p>11 conclusion.</p> <p>12 To the extent you can answer without</p> <p>13 violating attorney-client privilege, you</p> <p>14 may do so.</p> <p>15 A. I don't have anything to say about</p> <p>16 that.</p> <p>17 Q. Now after the RDO API was turned off,</p> <p>18 your account with RDO was suspended.</p> <p>19 Did ReDigi continue to offer streams</p> <p>20 of audio clips to ReDigi users by other means?</p> <p>21 A. ReDigi did not offer clips by some</p> <p>22 other means. We -- people went to, to YouTube</p> <p>23 clips.</p> <p>24 Q. Since the termination of the RDO</p> <p>25 relationship, is the only way that a user could</p>

<p style="text-align: right;">Page 182</p> <p>1 L. Rudolph</p> <p>2 obtain a stream of an audio clip on ReDigi by</p> <p>3 hearing a YouTube stream? Is that what you're</p> <p>4 saying?</p> <p>5 A. We're saying that we send users to</p> <p>6 other sites to listen to the clips.</p> <p>7 Q. And those other sites, any other</p> <p>8 sites besides YouTube?</p> <p>9 A. iTunes.</p> <p>10 Q. Okay. How recently have you --</p> <p>11 iTunes is a recent referral?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. And before that it was solely</p> <p>14 YouTube?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. The audio streams offered for</p> <p>17 YouTube had been offered in a couple of</p> <p>18 different ways, correct?</p> <p>19 A. I don't know what you mean by couple</p> <p>20 of different ways.</p> <p>21 Q. Did you ever offer streams of YouTube</p> <p>22 clips using YouTube's imbedded player, also</p> <p>23 sometimes called its API, seems to be the same</p> <p>24 thing?</p> <p>25 A. I don't believe we used their</p>	<p style="text-align: right;">Page 183</p> <p>1 L. Rudolph</p> <p>2 embedded player.</p> <p>3 Q. Okay. There was a period of time</p> <p>4 when clicking on a little green arrow icon next</p> <p>5 to a song file pulled up a ReDigi box that said</p> <p>6 nothing about YouTube and played an audio</p> <p>7 stream. Also had a little message to Capitol</p> <p>8 Recordings, but did those audio streams come</p> <p>9 from YouTube?</p> <p>10 This is post termination of the RDO</p> <p>11 agreement.</p> <p>12 A. It popped open a window that was</p> <p>13 small and came -- and that was a YouTube window.</p> <p>14 Q. The address that appeared in that</p> <p>15 window said nothing about YouTube, so the</p> <p>16 address was masked somehow.</p> <p>17 Do you recall the green -- it was a</p> <p>18 green box. Do you recall what I'm talking</p> <p>19 about?</p> <p>20 MR. ADELMAN: Is that a statement or</p> <p>21 are you asking him?</p> <p>22 MR. KING: I don't have an exhibit.</p> <p>23 He can confirm or deny.</p> <p>24 MR. ADELMAN: Well, I'm asking if</p> <p>25 you're asking or telling him.</p>
<p style="text-align: right;">Page 184</p> <p>1 L. Rudolph</p> <p>2 BY MR. KING:</p> <p>3 Q. I'm representing that I have seen, I</p> <p>4 saw multiple times a box that said nothing about</p> <p>5 window, nothing about YouTube. It was a green</p> <p>6 box that only identified ReDigi as the source</p> <p>7 and played an audio stream.</p> <p>8 A. At the time I just believe we just</p> <p>9 made the box really small.</p> <p>10 Q. But I could read the address on the</p> <p>11 box and it said ReDigi, so --</p> <p>12 MR. ADELMAN: Objection.</p> <p>13 MR. KING: Well, let me finish my</p> <p>14 question.</p> <p>15 BY MR. KING:</p> <p>16 Q. So is it possible that the stream was</p> <p>17 actually coming from YouTube but just the</p> <p>18 address was masked?</p> <p>19 A. I don't know if the address masked.</p> <p>20 I can't remember what appeared on the screen,</p> <p>21 but ReDigi directed -- it was a -- it was --</p> <p>22 ReDigi directed the browser to open up a window</p> <p>23 from -- for YouTube and play it.</p> <p>24 Q. Okay. Then how come as a user, I,</p> <p>25 for example, didn't see any reference to user,</p>	<p style="text-align: right;">Page 185</p> <p>1 L. Rudolph</p> <p>2 didn't see any YouTube video?</p> <p>3 A. Because it was small. Box was small,</p> <p>4 the window was small.</p> <p>5 Q. The box actually played nothing. It</p> <p>6 was just a black box surrounded by green. There</p> <p>7 was no video component to it.</p> <p>8 So separate and apart from its size,</p> <p>9 why was there no reference to video or YouTube?</p> <p>10 MR. ADELMAN: Objection.</p> <p>11 Instead of testifying, can you ask</p> <p>12 him whether the box was black as opposed to</p> <p>13 stating it affirmatively since you're not</p> <p>14 testifying?</p> <p>15 BY MR. KING:</p> <p>16 Q. You can confirm or tell me if I'm</p> <p>17 wrong.</p> <p>18 MR. ADELMAN: No. I object to the --</p> <p>19 fine. Objection to the form.</p> <p>20 A. I'm fairly sure that because we made</p> <p>21 the window small, that all the other images</p> <p>22 there were not easy to see, weren't displayed,</p> <p>23 but they were there in the box. They were there</p> <p>24 in the window.</p> <p>25 Q. And that was not via YouTube API or</p>

<p style="text-align: right;">Page 186</p> <p>1 L. Rudolph</p> <p>2 embedded player?</p> <p>3 A. It was not via API embedded player.</p> <p>4 Q. Was it just a straight hyperlink?</p> <p>5 A. I don't recall how we did the</p> <p>6 hyperlink.</p> <p>7 Q. Were you the person who set this up?</p> <p>8 A. No.</p> <p>9 Q. Who was?</p> <p>10 A. Our engineer.</p> <p>11 Q. How do we find out the answer to this</p> <p>12 question if we want to know how those --</p> <p>13 A. We can give you the code.</p> <p>14 </p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19 MR. ADELMAN: Take it under</p> <p>20 advisement.</p> <p>21 BY MR. KING:</p> <p>22 Q. Did you ever -- are you familiar with</p> <p>23 the process of iframing?</p> <p>24 A. Somewhat.</p> <p>25 Q. Do you believe you ever iframed in</p>	<p style="text-align: right;">Page 187</p> <p>1 L. Rudolph</p> <p>2 connection with YouTube videos or YouTube audio</p> <p>3 streams?</p> <p>4 A. I believe we did not, but I cannot</p> <p>5 recall.</p> <p>6 Q. Okay. Now these referrals to</p> <p>7 YouTube, are they to 30-second clips or to</p> <p>8 full-length sound recordings?</p> <p>9 A. They are whatever there is on</p> <p>10 YouTube.</p> <p>11 Q. How do you select which YouTube links</p> <p>12 refer --</p> <p>13 A. By doing a search on track title and</p> <p>14 artist.</p> <p>15 Q. So for each song that's available on</p> <p>16 ReDigi, someone actually goes and does a manual</p> <p>17 search for a YouTube video of that song, places</p> <p>18 the link on ReDigi?</p> <p>19 A. No. When you click on -- when you</p> <p>20 click on the song, we then do a lookup.</p> <p>21 Q. So by clicking on the song, you're</p> <p>22 essentially typing the name of the song into the</p> <p>23 YouTube search bar?</p> <p>24 A. It's functionally equivalent, yes.</p> <p>25 Q. And do you know whether the links</p>
<p style="text-align: right;">Page 188</p> <p>1 L. Rudolph</p> <p>2 that you're pulling up are authorized or pirated</p> <p>3 links?</p> <p>4 MR. ADELMAN: Objection to form.</p> <p>5 Go ahead.</p> <p>6 A. We know they're on YouTube. We don't</p> <p>7 know anything else.</p> <p>8 Q. Right.</p> <p>9 So they could be copyright infringing</p> <p>10 the YouTube files, correct?</p> <p>11 MR. ADELMAN: Objection to form.</p> <p>12 Calls for a legal conclusion.</p> <p>13 You can answer.</p> <p>14 BY MR. KING:</p> <p>15 Q. You just don't know?</p> <p>16 A. I don't know.</p> <p>17 Q. Okay. They're just files that come</p> <p>18 up when you search the name of the track on</p> <p>19 YouTube; is that correct?</p> <p>20 A. I'm assuming that YouTube does the</p> <p>21 right thing.</p> <p>22 Q. Do you have any agreement with</p> <p>23 YouTube that permits you to do this?</p> <p>24 A. We follow the YouTube terms of</p> <p>25 service.</p>	<p style="text-align: right;">Page 189</p> <p>1 L. Rudolph</p> <p></p>

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EXHIBIT 11

FILED UNDER SEAL

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4

5 CAPITOL RECORDS, LLC,)
6)
7 Plaintiff,) 12 Civ. 0095 (RJS)
8)
9 vs.)
10)
11 REDIGI INC.,)
12)
13 Defendant.)
14 -----)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

12 * CONFIDENTIAL - ATTORNEYS' EYES ONLY *

14 * CONTAINS OUTSIDE COUNSEL ONLY PORTIONS *

17 DEPOSITION OF JOHN MARK OSSENMACHER

18 New York, New York

19 Tuesday, June 19, 2012
20
21
22
23

24 Reported by: KRISTIN KOCH, RPR, RMR, CRR, CLR

25 JOB NO. 50450

Page 2	Page 3
<p>1 2 3 4 5 June 19, 2012 6 10:00 a.m. 7 8 9 Deposition of REDIGI, INC., by JOHN 10 MARK OSSENMACHER, held pursuant to Rule 11 30(b)(6) of the Federal Rules of Civil 12 Procedure, at the offices of Cowan, 13 Liebowitz & Latman, P.C., 1133 Avenue of 14 the Americas, New York, New York, before 15 Kristin Koch, a Registered Professional 16 Reporter, Registered Merit Reporter, 17 Certified Realtime Reporter, Certified 18 Livenote Reporter and Notary Public of the 19 State of New York. 20 21 22 23 24 25</p>	<p>1 2 A P P E A R A N C E S: 3 4 5 COWAN, LIEBOWITZ & LATMAN 6 Attorneys for Plaintiff 7 1133 Avenue of the Americas 8 New York, New York 10036 9 BY: RICHARD S. MANDEL, ESQ. 10 JONATHAN Z. KING, ESQ. 11 12 13 MEISTER SEELIG & FEIN 14 Attorneys for Defendant 15 140 East 45th Street 16 New York, New York 10017 17 BY: GARY P. ADELMAN, ESQ. 18 19 20 21 A L S O P R E S E N T: 22 23 LARRY RUDOLPH 24 25</p>
Page 4	Page 5
<p>1 2 IT IS HEREBY STIPULATED AND AGREED 3 by and between the attorneys for the 4 respective parties herein, that filing and 5 sealing be and the same are hereby waived. 6 IT IS FURTHER STIPULATED AND AGREED 7 that all objections, except as to the form 8 of the question, shall be reserved to the 9 time of the trial. 10 IT IS FURTHER STIPULATED AND AGREED 11 that the within deposition may be sworn to 12 and signed before any officer authorized 13 to administer an oath, with the same 14 force and effect as if signed and sworn 15 to before the Court. 16 17 18 19 20 - oOo - 21 22 23 24 25</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 JOHN MARK OSSENMACHER, 3 called as a witness, having been duly sworn 4 by a Notary Public, was examined and 5 testified as follows: 6 EXAMINATION BY 7 MR. MANDEL: 8 Q. Please state your name for the 9 record. 10 A. John Ossenmacher. 11 Q. And where do you reside, 12 Mr. Ossenmacher? 13 A. In Boston, Massachusetts. 14 Q. Okay. And you are the CEO of the 15 defendant ReDigi, Inc.; correct? 16 A. Yes. 17 MR. MANDEL: Before we begin, let me 18 just ask you to take a look at what was 19 marked yesterday as Plaintiff's Exhibit 1. 20 As we did yesterday, we can just go 21 over this by counsel. 22 I just want to confirm for the 23 record that Mr. Ossenmacher is being 24 offered as a 30(b)(6) designee on behalf of 25 Defendant ReDigi with respect to topics 1</p>

Page 22	Page 23
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 into the plans that were under discussion with 3 respect to the lacrosse league? 4 A. Sure. The idea was to attract a 5 certain demographic, a youthful demographic, 6 you know, that likes music and to do these 7 events on Friday or Saturday evenings when the 8 arenas weren't having another use and so there 9 was going to be an idea to use up-and-coming 10 bands to showcase their abilities and have kids 11 come and listen and enjoy. 12 Q. So that was separate and apart from 13 the lacrosse league or was it going to be in 14 connection with the lacrosse -- 15 A. It was connected. It was meant to 16 it be all together, yeah. 17 Q. And would those concerts promote the 18 lacrosse league, was that part of the idea? 19 A. Yes. 20 Q. Now, up until that point it doesn't 21 sound like any of your background was in the 22 music industry. Is that fair to say? 23 A. Yes. 24 Q. Did you have any prior involvement 25 at all with projects in the music industry?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. The only reason I am hesitating 3 slightly is we had done some charity things 4 with some bands, but other than that, no. 5 There was -- no. 6 Q. And in terms of the lacrosse project 7 and the intersection with musical content, did 8 you actually go down the road of exploring how 9 that would be done from a legal perspective? 10 A. I'm not sure I understand the 11 question. 12 Q. Let me rephrase it. Did you have 13 occasion to have to consider any copyright law 14 implications in connection with plans that were 15 under discussion for the lacrosse league? 16 A. Yes. I think the discussion there 17 was in the bands that were being considered 18 they had to own the copyright to the material 19 they used, that they were going to use, and 20 that they had to have the rights to whatever 21 performance they were going to do, but, again, 22 that was something the lawyers were working on 23 and I wasn't. 24 Q. So you weren't personally involved 25 in studying the copyright law aspects of that</p>
Page 24	Page 25
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 situation? 3 A. Not at that time, no. 4 Q. Okay. What happened next after you 5 decided that AWE Mobile wasn't really going to 6 go anywhere? What did you do next? 7 A. That's when I, you know, just in 8 things we were doing started looking at -- I 9 had learned lots of things about the arena and 10 learned many things about how their systems 11 work and problems they have, and part of my 12 nature is a problem solver, and so one of the 13 things I learned during that process was they 14 had significant problems with ticketing and how 15 ticketing was handled, the cost of ticketing, 16 and so I started working on a solution with one 17 of the arenas to come up with a new type of 18 digital ticketing technology that would be 19 significant. 20 Q. And did you actually form any 21 business in connection with that? 22 A. That was the start of Intellisys 23 Group. 24 Q. So tell me what Intellisys Group is 25 or was.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. So Intellisys was set up and we 3 started working on the ticketing project and 4 then there were a couple of other projects that 5 ended up in Intellisys as well. One was 6 another arena owner I knew hosts a major -- the 7 world's largest skateboarding event, and so we 8 started working on some skateboarding 9 technology, basically apps and some other 10 things for them, which we delivered and are 11 being used today, in a project we called Skate 12 Hub. And -- there was something else. I don't 13 know why I am drawing a blank on it. There 14 were a few little projects that we had going 15 there and that was kind of, I guess, the time 16 also when towards the end of that when, you 17 know, we started contemplating this idea of 18 donating initially music and using music to 19 help, you know, as Larry said yesterday, the 20 kids with cancer, but it was meant to go to the 21 troops and other people who -- you know, we 22 thought music -- I guess the bottom line was we 23 feel music is good for the soul and makes 24 people feel better and so we thought -- and 25 actually the idea came from my daughter</p>

Page 26	Page 27
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 initially, because she is heavily involved in</p> <p>3 charitable things, saying "dad, can we help</p> <p>4 these kids out," she was doing things for the</p> <p>5 troops at the time, packing up all the gift</p> <p>6 boxes and all that stuff, and "is there a way</p> <p>7 we can give them music to make them feel</p> <p>8 better," and so that was kind of the start of</p> <p>9 thinking about what are all the reasons why we</p> <p>10 can or can't gift music, and we originally</p> <p>11 started -- the project was originally called</p> <p>12 Gift Music, actually. I think if you go to</p> <p>13 Gift Music dot-com today it probably takes you</p> <p>14 to ReDigi, but, I mean, that was the start of</p> <p>15 it. So that was Intellisys.</p> <p>16 Q. Okay. Was Intellisys Group actually</p> <p>17 formed as a corporate entity?</p> <p>18 A. It was formed as an LLC.</p> <p>19 Q. And when was that formed?</p> <p>20 A. Oh, man. You know, actually, I am</p> <p>21 trying to think. I will have to go back to our</p> <p>22 attorneys on that. We were going to set it up</p> <p>23 as an LLC, but I'm actually not sure if we ever</p> <p>24 ended up doing it. I think we did. And I</p> <p>25 would say probably maybe 2008, 2009, somewhere</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 in that range.</p> <p>3 Q. And when you formed Intellisys</p> <p>4 Group, what was the idea? Did it have a</p> <p>5 specific business purpose?</p> <p>6 A. It was to try to use technology to,</p> <p>7 you know, do things, and, you know, some of</p> <p>8 those things were the ones that we kind of</p> <p>9 mentioned. You know, we had this immediate</p> <p>10 need with arenas that was on the ticketing</p> <p>11 side. One of my friends who I got to know</p> <p>12 pretty well who owns an NBA team and also an</p> <p>13 arena wanted us to help him with a</p> <p>14 skateboarding thing. So it was just meant to</p> <p>15 be kind of a little bit of a catch-all.</p> <p>16 Q. A catch-all for the various projects</p> <p>17 you --</p> <p>18 A. Just the projects we were working</p> <p>19 on, yeah.</p> <p>20 Q. And did you have any investors in</p> <p>21 that entity?</p> <p>22 A. No.</p> <p>23 Q. Did you envision it as a for-profit</p> <p>24 entity when you formed it?</p> <p>25 A. Parts of it. You know, Gift Music</p>
Page 28	Page 29
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 at the original time was meant to be a</p> <p>3 charitable, but the other ones were definitely</p> <p>4 for profit, yes.</p> <p>5 Q. So what was the concept of Gift</p> <p>6 Music when it first came up?</p> <p>7 A. The concept was is there a way where</p> <p>8 other kids or other people can lawfully gift</p> <p>9 their music to people in need, people that</p> <p>10 can't afford to buy the music, and do it in a</p> <p>11 way where they don't steal music, so it was</p> <p>12 kind of meant to be a way to provide this nice</p> <p>13 service to people that maybe would make them</p> <p>14 feel better because they can now listen to</p> <p>15 music and escape maybe the feeling of</p> <p>16 chemotherapy that they are in or troops sitting</p> <p>17 there in the middle of the desert. You know,</p> <p>18 that was the whole concept. So the original</p> <p>19 concept was to do it as a donation-type system.</p> <p>20 Q. And whose idea was that?</p> <p>21 A. Well, that was my daughter's idea.</p> <p>22 Q. In its original form were you</p> <p>23 thinking about it in terms of gifting digital</p> <p>24 music as opposed to other forms?</p> <p>25 A. It was meant specifically for</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 digital music, yes.</p> <p>3 Q. And you said your daughter raised it</p> <p>4 with you and I take it you became interested in</p> <p>5 that?</p> <p>6 A. Yes.</p> <p>7 Q. So what did you do next in terms of</p> <p>8 exploring the possibilities of bringing that to</p> <p>9 fruition?</p> <p>10 A. So that's where we started to do</p> <p>11 research, you know, which is also part of my</p> <p>12 nature, you know, to try to understand things.</p> <p>13 You know, a lot of it was Internet research and</p> <p>14 then subsequently discussion with law firms,</p> <p>15 some of the people that I had known at the</p> <p>16 time, but it was how do we go about doing this,</p> <p>17 is there a way to do it.</p> <p>18 Q. When you say "Internet research,"</p> <p>19 did you, yourself, actually do research on the</p> <p>20 Internet?</p> <p>21 A. Yes.</p> <p>22 Q. And is that when you first started</p> <p>23 having occasion to look into copyright law?</p> <p>24 A. Yes.</p> <p>25 Q. And were you actually trying to</p>

Page 30	Page 31
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 learn the copyright law by doing research?</p> <p>3 A. I don't know if I was trying to</p> <p>4 learn the copyright law. I was trying to</p> <p>5 understand the copyright law and how that</p> <p>6 applied to -- at the time I didn't understand</p> <p>7 what the -- you know, what the bounds of it</p> <p>8 were, so I was trying to understand how does</p> <p>9 that apply to people donating things, for</p> <p>10 example, like can you donate something that is,</p> <p>11 you know, copyright protected, and that was</p> <p>12 part of the original desire to learn more, and</p> <p>13 then I, of course, learned a lot more.</p> <p>14 Q. And in terms of your research, is</p> <p>15 that when you had first occasion to hear of</p> <p>16 something called the First Sale Doctrine?</p> <p>17 A. I think I had heard of it</p> <p>18 previously, but it was certainly my first</p> <p>19 occasion to really delve into it more and seek</p> <p>20 a greater understanding of it.</p> <p>21 Q. And separate and apart from any</p> <p>22 consultation that you may have had with counsel</p> <p>23 at the time, did you, yourself, based on your</p> <p>24 Internet research form any conclusions as to</p> <p>25 how any aspect of the copyright law impacted on</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 your potential plans?</p> <p>3 A. Yes.</p> <p>4 Q. What conclusion did you reach?</p> <p>5 A. I reached the conclusion that it was</p> <p>6 exciting to me, because I found it to be</p> <p>7 fertile ground on the digital side because</p> <p>8 technology didn't seem to have been readily</p> <p>9 available that would allow transfers between</p> <p>10 users in certain types of parameters, and I</p> <p>11 thought -- you know, part of what I think got</p> <p>12 me excited and Larry excited then was the idea</p> <p>13 of being able to use technology to be able to</p> <p>14 be compliant with copyright law.</p> <p>15 Q. What were the copyright law</p> <p>16 implications that you based on your research --</p> <p>17 let me strike that. Let me rephrase the</p> <p>18 question.</p> <p>19 What barriers, if any, did you feel</p> <p>20 copyright law imposed to the potential plans</p> <p>21 that you wanted to implement?</p> <p>22 MR. ADELMAN: Objection to form.</p> <p>23 You can answer.</p> <p>24 A. Okay. I thought a couple of things.</p> <p>25 So one was I -- on the barrier side it seemed</p>
Page 32	Page 33
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 that the challenge, and this is part of the</p> <p>3 technical part that was exciting to me, was how</p> <p>4 do you have -- how do you transfer a digital</p> <p>5 good where two people are owning the same good</p> <p>6 at the same time, and with technologies that</p> <p>7 had been previously available obviously it was</p> <p>8 not possible to do, and so that obstacle, I</p> <p>9 think, had kind of left the market open because</p> <p>10 nobody had really understood how do you</p> <p>11 transfer without having simultaneous ownership</p> <p>12 by two parties, and then the other thing that</p> <p>13 as I learned more about copyright law, going</p> <p>14 back to your question about First Sale</p> <p>15 Doctrine, was that there are also limitations</p> <p>16 to copyright law, and so that I did a fair</p> <p>17 amount of research on, you know, the fact that</p> <p>18 once something is acquired and purchased and</p> <p>19 royalties have been paid, that the owner of</p> <p>20 that is entitled to do certain things with</p> <p>21 them. They can gift them, they can sell them.</p> <p>22 And so I think that education -- you know,</p> <p>23 those things were important to me. Those were</p> <p>24 two big things that came up as I did my</p> <p>25 research.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 Q. And those are things that you</p> <p>3 discovered on your own before you even</p> <p>4 consulted with any attorneys?</p> <p>5 A. Correct.</p> <p>6 Q. So you identified at least the</p> <p>7 issues that existed?</p> <p>8 A. To me.</p> <p>9 Q. Okay. And based on your</p> <p>10 evaluation -- let's talk about the first of</p> <p>11 those things. You talked about the transfer of</p> <p>12 digital goods.</p> <p>13 Was it your conclusion that there</p> <p>14 would be a copyright law issue if at the end of</p> <p>15 a so-called transfer the original party still</p> <p>16 retained a copy of the digital good that was</p> <p>17 supposedly being transferred?</p> <p>18 MR. ADELMAN: Objection to form, but</p> <p>19 you can answer.</p> <p>20 A. No, I didn't think there would be a</p> <p>21 copyright issue. Part of what I had learned</p> <p>22 during copyright was, again, just studying, and</p> <p>23 one of the things we tried to do is understand</p> <p>24 how is the law currently implemented and how is</p> <p>25 the law currently enforced, and so, you know,</p>

Page 42	Page 43
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 A. I'm not sure I understand the</p> <p>3 question.</p> <p>4 Q. Let me try and rephrase it.</p> <p>5 Is it correct that based on what you</p> <p>6 reviewed, that the First Sale Doctrine doesn't</p> <p>7 apply if you sell something that you copied?</p> <p>8 A. So there is language in the</p> <p>9 copyright law that I recall that has to do with</p> <p>10 copying things, you know, and I think it was</p> <p>11 probably meant for books and other types of</p> <p>12 devices, but yes, I understand there is</p> <p>13 language in there that talks about that.</p> <p>14 Q. Did you understand that in the</p> <p>15 copyright office report it talked about how if</p> <p>16 you actually have to make a copy in order to</p> <p>17 affect the transaction, that it's no longer</p> <p>18 covered by the First Sale Doctrine?</p> <p>19 MR. ADELMAN: Objection to form.</p> <p>20 You can answer.</p> <p>21 A. I'm not sure I understand that.</p> <p>22 Q. You are not sure you understand my</p> <p>23 question or you are not sure that's your</p> <p>24 understanding of what the copyright office</p> <p>25 said?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 A. Probably both.</p> <p>3 Q. Did you understand part of the</p> <p>4 reason the copyright office -- strike that.</p> <p>5 Did you understand the copyright</p> <p>6 office to say that under traditional First Sale</p> <p>7 Doctrine that if you made a copy of a work and</p> <p>8 then distributed that copy, that the First Sale</p> <p>9 Doctrine did not apply?</p> <p>10 MR. ADELMAN: I am going to object,</p> <p>11 calls for a legal conclusion, but allow you</p> <p>12 to answer.</p> <p>13 A. I understand in a physical goods</p> <p>14 world that taking a copy of a hard cover book</p> <p>15 or something, making a copy of that book and</p> <p>16 trying to sell that book was the intent of</p> <p>17 that, and yes, I understand that that's not</p> <p>18 allowable.</p> <p>19 Q. Okay. In a digital context, if I</p> <p>20 make a copy of my music file and then</p> <p>21 distribute that copy, is it your understanding</p> <p>22 that the First Sale Doctrine does or does not</p> <p>23 apply to that transaction?</p> <p>24 MR. ADELMAN: Objection. Calls for</p> <p>25 a legal conclusion, but I'll allow you to</p>
Page 44	Page 45
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 answer if you know.</p> <p>3 A. I'm not sure, but we don't make</p> <p>4 copies, so we are not worried about that.</p> <p>5 Q. Okay. You say you don't make</p> <p>6 copies, but you understand that when this issue</p> <p>7 came up for the first time for resolution</p> <p>8 before the court in this case that isn't the</p> <p>9 position that you took in the court; right?</p> <p>10 MR. ADELMAN: Objection to form.</p> <p>11 A. I'm -- I don't agree with that.</p> <p>12 Q. Okay. Well, let me ask you to take</p> <p>13 a look at, if you can, at Plaintiff's</p> <p>14 Exhibit 3.</p> <p>15 You recognize Exhibit 3 as the brief</p> <p>16 that was submitted by ReDigi in opposition to</p> <p>17 Capitol's motion for preliminary injunction in</p> <p>18 this case?</p> <p>19 A. Yes, I do.</p> <p>20 Q. And if you look at page 9 under the</p> <p>21 part that begins under Section B(i) the first</p> <p>22 sentence says: "The only copying which takes</p> <p>23 place in the ReDigi service occurs when a user</p> <p>24 uploads music files to the ReDigi cloud thereby</p> <p>25 storing copies thereof in the user's personal</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 cloud locker or downloads music files from the</p> <p>3 user's cloud locker thereby placing copies of</p> <p>4 the files on his or her computer." You see</p> <p>5 that language; right?</p> <p>6 A. Yes.</p> <p>7 Q. And did you review that language</p> <p>8 before it was submitted to court?</p> <p>9 A. Yes.</p> <p>10 Q. And you don't believe that that</p> <p>11 language indicates that a copy takes place in</p> <p>12 connection with the ReDigi service?</p> <p>13 A. Would you like me to explain?</p> <p>14 Q. Sure, if you want to.</p> <p>15 A. So when -- at this point in time</p> <p>16 part of the ReDigi service did make an archival</p> <p>17 copy of the source file and so we made an</p> <p>18 archival copy because, as Larry had talked</p> <p>19 about yesterday, one of the things computer</p> <p>20 scientists often worry about was this whole</p> <p>21 thing of when you are migrating a file or doing</p> <p>22 something in the computer world, you know, what</p> <p>23 could go wrong, and so in the early days of</p> <p>24 this, which was during this period of time, we</p> <p>25 were making an archival copy so that during the</p>

Page 46	Page 47
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 migration of the source file to the user's 3 cloud, if there was a problem, we could then 4 rely on the archival file to support whatever 5 data might have been lost in translation or 6 whatever. Subsequent to this, after this point 7 in time we no longer use an archival copy and 8 so we are not -- this is no longer completely 9 accurate, because we don't have that archival 10 copy anymore. 11 Q. Okay. But this isn't talking about 12 an archival copy. I mean, this says when a 13 user uploads music files to the -- the only 14 copying which takes place occurs when a user 15 uploads music files to the ReDigi cloud thereby 16 storing copies thereof in the user's personal 17 locker, so it's referring to what's in the 18 user's personal locker as a copy, isn't it? 19 MR. ADELMAN: Objection. You 20 misread what that actually says. 21 A. No. 22 MR. ADELMAN: Hold on. You didn't 23 read it -- was your purpose to characterize 24 it? 25 MR. MANDEL: No, my purpose was to</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 shorten it, but I am happy to read the 3 whole thing, if you would like. 4 MR. ADELMAN: Yes, I think it's 5 important. 6 MR. MANDEL: Okay. 7 MR. ADELMAN: I appreciate that. 8 Q. It says: "The only copying which 9 takes place in the ReDigi service occurs when a 10 user uploads music files to the ReDigi cloud 11 thereby storing copies thereof in the user's 12 personal cloud locker." 13 So it does refer to what's in the 14 user's personal locker as a copy; correct? 15 A. Would you like me to explain that? 16 Q. Sure. 17 A. Okay. So, again, the only copying 18 that takes place in ReDigi is a creating of 19 that archival copy when a user goes to push 20 upload. When they decide they want to migrate 21 their file from their computer to their cloud, 22 that was the point in time where we were 23 actually on their computer keeping an archival 24 copy on their computer, and when the process 25 was completed, that was treated as any other</p>
Page 48	Page 49
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 copy and was removed. 3 Q. During what period of time did 4 ReDigi actually make archival copies during the 5 process of upload? 6 A. I would say it did it from the point 7 of time of launch, which was October, until -- 8 I can't remember the exact date, but it was one 9 of our upgrades. I feel it was sometime in 10 March. 11 Q. March of 2012? 12 A. Yes. 13 Q. And you understand that the defense 14 that was raised to the copying in this brief 15 was that it was a fair use because the user had 16 the right to space-shift their files; correct? 17 MR. ADELMAN: Objection to form. 18 Calls for a legal conclusion, but you are 19 free to answer. 20 A. I'm not sure and -- you know, I'm 21 not sure what... 22 MR. ADELMAN: When you get to a 23 point that makes sense, I just have to take 24 a break. 25 MR. MANDEL: Sure.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 MR. ADELMAN: It doesn't have to be 3 now. Whenever it makes sense. 4 MR. MANDEL: I'll do it shortly. 5 Q. Was the archival copy that you are 6 talking about actually retained or destroyed 7 once the upload was complete? 8 A. It was removed once the upload was 9 complete. 10 Q. So it existed only during the period 11 of the uploading process? 12 A. Yes. 13 Q. And then it was deleted? 14 A. It was removed. 15 Q. Is there a difference between 16 removing it and deleting it? 17 A. I like to go with what our CTO 18 directs us. He uses lots of different 19 processes. There are lots of different 20 processes that are part of the ReDigi system, 21 and so I know that we remove those copies. 22 Q. Well, I am just wondering, 23 because -- if there is a difference between 24 removal and delete, as far as you understand. 25 A. I think Larry explained yesterday</p>

<p style="text-align: right;">Page 58</p> <p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 Q. That may be fine, but in your prior</p> <p>3 testimony you didn't say anything about</p> <p>4 feedback from copyright owners at all, so I am</p> <p>5 just trying to understand what the actual</p> <p>6 motivation was for stopping to make archival</p> <p>7 copies.</p> <p>8 MR. ADELMAN: Objection to form.</p> <p>9 You can answer.</p> <p>10 A. I'm not sure what prior testimony</p> <p>11 you are discussing, because we have continually</p> <p>12 talked about including copyright owners.</p> <p>13 Q. Well, not in your answers as to why</p> <p>14 you stopped making archival copies. You</p> <p>15 identified it as a customer service matter and</p> <p>16 an improvement of the system. You didn't say</p> <p>17 it had anything to do with any implication from</p> <p>18 copyright owners. So let me just ask it</p> <p>19 directly.</p> <p>20 Did you stop making archival copies</p> <p>21 for any reason related to the potential impact</p> <p>22 on copyright owners' rights?</p> <p>23 MR. ADELMAN: Objection to form.</p> <p>24 Calls for a legal conclusion. It's</p> <p>25 argumentative.</p>	<p style="text-align: right;">Page 59</p> <p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 You can answer.</p> <p>3 A. Not in relation to copy holders'</p> <p>4 rights, but certainly as part of our learning</p> <p>5 and understanding it seemed like it might be a</p> <p>6 nice accommodation to do that, yes.</p> <p>7 Q. Okay. Now, when I first started</p> <p>8 this discussion about First Sale Doctrine and</p> <p>9 whether making copies was a problem, you said</p> <p>10 you weren't worried about that because "we</p> <p>11 don't make copies." Do you remember that</p> <p>12 testimony?</p> <p>13 A. Yes.</p> <p>14 Q. But when you first started operation</p> <p>15 you did make copies, so at that point that</p> <p>16 would have been something you would have had to</p> <p>17 consider, correct?</p> <p>18 MR. ADELMAN: Objection to form.</p> <p>19 You can answer.</p> <p>20 A. I'm not sure what the question is.</p> <p>21 It seemed more like a statement.</p> <p>22 Q. It's a question.</p> <p>23 A. What's the question?</p> <p>24 Q. The question is at the time that</p> <p>25 ReDigi was making copies, did you ever consider</p>
<p style="text-align: right;">Page 60</p> <p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 what impact that had on your interpretation of</p> <p>3 the First Sale Doctrine?</p> <p>4 MR. ADELMAN: Objection. Calls for</p> <p>5 a legal conclusion, but you can answer.</p> <p>6 A. Other than archival copies, ReDigi</p> <p>7 was not making copies.</p> <p>8 Q. And your understanding was the</p> <p>9 archival copies were okay?</p> <p>10 MR. ADELMAN: Objection to form.</p> <p>11 You can answer.</p> <p>12 A. Yes.</p> <p>13 Q. And did you -- let me bring you</p> <p>14 back. I know you said you first started doing</p> <p>15 some research on the Internet yourself in terms</p> <p>16 of copyright law. Do you recall that</p> <p>17 testimony?</p> <p>18 A. Yes.</p> <p>19 Q. Would that have been around the</p> <p>20 2008, 2009 time period?</p> <p>21 A. Yes.</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p style="text-align: right;">Page 61</p> <p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>

Page 66	Page 67
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>23 Q. When did ReDigi get formed as a</p> <p>24 corporate entity?</p> <p>25 A. In May -- April, May of 2011.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 Q. And you described the evolution of</p> <p>3 your idea with the gift of music. How did that</p> <p>4 evolve into the ReDigi concept? Can you</p> <p>5 describe how that transformation took place?</p> <p>6 A. So I would say in early 2011 we</p> <p>7 started to do a little bit more work with --</p> <p>8 once we felt we had a technological solution we</p> <p>9 wanted to look at how would we bring gift music</p> <p>10 to market and what we realized through user</p> <p>11 groups -- we did some student user groups when</p> <p>12 we had students. What we learned through those</p> <p>13 was people thought it was a cool idea, but they</p> <p>14 probably wouldn't use it that regularly to</p> <p>15 donate music, and so then the idea came</p> <p>16 basically from that was, you know, if you guys</p> <p>17 would allow us to be able to resell our music,</p> <p>18 then we would be coming to your site regularly</p> <p>19 and we would probably donate more, because it</p> <p>20 would be something we would feel more</p> <p>21 comfortable doing, so the whole concept then of</p> <p>22 making the business a marketplace where people</p> <p>23 could buy and sell used digital music and</p> <p>24 donate used digital music, that's where that</p> <p>25 really evolved, is that became more of an ideal</p>
Page 68	Page 69
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 for how we could actually launch a successful</p> <p>3 business rather than have something that nobody</p> <p>4 would use.</p> <p>5 Q. You made reference to a</p> <p>6 technological solution. How did -- describe</p> <p>7 for me the process of how that came to be</p> <p>8 formed.</p> <p>9 A. Again, with Larry, you know, we</p> <p>10 spent a lot of time trying to figure out that</p> <p>11 issue we talked about, many issues, but the key</p> <p>12 issue that we wanted a solution to was how do</p> <p>13 we exchange title of a good autonomically or</p> <p>14 simultaneously with the exchange of cash or</p> <p>15 ownership and so the whole idea of the</p> <p>16 in-the-cloud transaction was what we solved and</p> <p>17 that was some of the patent matter that</p> <p>18 Jonathan went over with Larry yesterday.</p> <p>19 Q. How did you meet Larry Rudolph?</p> <p>20 A. I met Larry in an airport and, you</p> <p>21 know, we started talking about various things.</p> <p>22 It's just a matter of how small the world is.</p> <p>23 I had read his book on bluetooth, because in</p> <p>24 the arena business bluetooth communications was</p> <p>25 key to some of the app development we were</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 doing, because there is very poor Wi-Fi signal</p> <p>3 in arenas, and so we felt if we could use a</p> <p>4 bluetooth solution to allow people to continue</p> <p>5 to these apps internally, which is actually</p> <p>6 very novel technology, we could provide a good</p> <p>7 solution there, so we just kind of hit it off</p> <p>8 and, you know, that's...</p> <p>9 Q. When was that?</p> <p>10 A. That was probably -- I think 2008.</p> <p>11 Q. And during that first conversation</p> <p>12 in the airport did you actually discuss with</p> <p>13 him your gift music idea?</p> <p>14 A. No.</p> <p>15 Q. So there was no discussion of that</p> <p>16 at that point?</p> <p>17 A. That idea didn't exist at that</p> <p>18 point.</p> <p>19 Q. And after you met Mr. Rudolph at the</p> <p>20 airport, you kept in touch with him?</p> <p>21 A. Yes.</p> <p>22 Q. And did you -- were you actually</p> <p>23 discussing with him at that point the</p> <p>24 possibility of working together on projects?</p> <p>25 A. We did.</p>

Page 74	Page 75
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 them to the cloud. Is it lawful how they have</p> <p>3 gotten them to the cloud. Why is it lawful in</p> <p>4 the way they have gotten them to the cloud. Is</p> <p>5 there a better way to do it. Is there a novel</p> <p>6 way to do it. Is there a way -- you know, how</p> <p>7 do you do it better and novel and still provide</p> <p>8 outstanding, you know, robust quality, and so,</p> <p>9 I mean, there was -- you are asking me to talk</p> <p>10 about all the things, but there were so many</p> <p>11 things that we talked about.</p> <p>12 Q. That's okay. That's helpful in</p> <p>13 terms of framing the general questions.</p> <p>14 In terms of how to get it to the</p> <p>15 cloud, what was your understanding of how that</p> <p>16 generally was taking place at that point in</p> <p>17 time?</p> <p>18 A. I think at that point in time</p> <p>19 people -- the cloud service that existed</p> <p>20 employed, you know, standard copying</p> <p>21 methodology.</p> <p>22 Q. When you say "standard copying</p> <p>23 methodology," is that language that Mr. Rudolph</p> <p>24 used at the time?</p> <p>25 A. I don't recall his exact language.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 Q. What do you mean by "standard</p> <p>3 copying methodology"?</p> <p>4 A. A copy with standard computer and</p> <p>5 then you would copy a copy to the cloud. You</p> <p>6 would have a copy of the instance on your</p> <p>7 computer and a copy of the instance at the</p> <p>8 cloud simultaneously. So there would be a copy</p> <p>9 in the cloud of what you have on your computer.</p> <p>10 Q. So that's what you understand</p> <p>11 standard to mean, the end result of there being</p> <p>12 two copies, one on the user's computer and one</p> <p>13 in the cloud?</p> <p>14 A. I guess that would be part of it,</p> <p>15 sure.</p> <p>16 Q. Is there anything else you</p> <p>17 understand to be standard copying methodology?</p> <p>18 A. I'm sure there is lots of them, you</p> <p>19 know, but I -- again, in this context that's</p> <p>20 what it meant.</p> <p>21 Q. And did you discuss with Mr. Rudolph</p> <p>22 that if you employed standard copying</p> <p>23 methodology, that wouldn't work, to your</p> <p>24 understanding, in terms of affecting the</p> <p>25 transaction?</p>
Page 76	Page 77
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 MR. ADELMAN: Objection to form.</p> <p>3 You can answer.</p> <p>4 A. No, at the time we actually</p> <p>5 considered doing that because existing services</p> <p>6 were doing that. It seemed allowable. It</p> <p>7 seemed the labels were allowing it. It seemed</p> <p>8 other copyright holders were allowing it. It</p> <p>9 seemed standard practice that people could</p> <p>10 actually do that and that users could actually</p> <p>11 use clouds to copy things to lawfully, so we</p> <p>12 did consider it but we felt we wanted to be</p> <p>13 better than that and we wanted to do something</p> <p>14 different than that, so we did.</p> <p>15 Q. When you say "better than that," I</p> <p>16 mean, was it your understanding based on the</p> <p>17 research you had done that if all that happened</p> <p>18 was the user just copied it to the cloud and</p> <p>19 then gave that copy to somebody else while</p> <p>20 retaining what they started with, that you</p> <p>21 would have a problem from a First Sale Doctrine</p> <p>22 perspective?</p> <p>23 MR. ADELMAN: Objection to form.</p> <p>24 A. Well, that's not how our service</p> <p>25 worked. We don't give anything to anybody, nor</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 do we keep multiple copies, so if you want me</p> <p>3 to speak to someone else who is doing</p> <p>4 something, I'm not sure I can do that. We were</p> <p>5 not doing that.</p> <p>6 Q. I understand, but you were talking</p> <p>7 about what you were going to implement and how</p> <p>8 you were going to implement it and that's what</p> <p>9 we are talking about at this --</p> <p>10 A. You asked me the things we</p> <p>11 considered and talked about. We talked about</p> <p>12 what other people were doing, which was that.</p> <p>13 That's what other people were doing. We didn't</p> <p>14 want to do that, so -- but we didn't not do</p> <p>15 that because we didn't think it unlawful. We</p> <p>16 actually thought it must be lawful because</p> <p>17 people are doing it.</p> <p>18 Q. And did you have any familiarity</p> <p>19 with the concept of file sharing at this point</p> <p>20 in time?</p> <p>21 A. In what term?</p> <p>22 Q. Had you read about the idea of file</p> <p>23 sharing services?</p> <p>24 A. Like the Limewires and the Napsters?</p> <p>25 Q. Yes.</p>

Page 78	Page 79
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 A. Yes.</p> <p>3 Q. Did you have any occasion to learn</p> <p>4 about any lawsuits that existed as a result of</p> <p>5 that?</p> <p>6 A. Yes.</p> <p>7 Q. And so you were aware that in the</p> <p>8 file sharing context there had been decisions</p> <p>9 that had been rendered that would certainly</p> <p>10 question the legality of that kind of conduct;</p> <p>11 correct?</p> <p>12 A. Actually, no. The readings I did on</p> <p>13 those areas were not about the illegality of</p> <p>14 moving a file to the cloud, but were more the</p> <p>15 illegality of actually taking that file and</p> <p>16 then parsing it and copying it millions of</p> <p>17 times and allowing people access to it that</p> <p>18 didn't have a right to it. The copyright</p> <p>19 holder was not protecting their obligation</p> <p>20 under copyright law to protect their copyright</p> <p>21 material, and so -- but I didn't find any</p> <p>22 readings where they said the actual movement of</p> <p>23 a file from someone's computer to the cloud was</p> <p>24 unlawful, but what was done after it got there</p> <p>25 was unlawful.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 Q. But you understood that a process by</p> <p>3 which multiple people ended up with the same</p> <p>4 music was found to involve unlawful copying;</p> <p>5 correct?</p> <p>6 MR. ADELMAN: Objection to form.</p> <p>7 Calls for a legal conclusion.</p> <p>8 A. All I will say is we thought that</p> <p>9 was terrible. I mean, part of ReDigi was how</p> <p>10 to help prevent file sharing, how to prevent</p> <p>11 piracy. We built the system with many controls</p> <p>12 so that when we uploaded a copy there is a</p> <p>13 single instance of that copy and that instance</p> <p>14 is controlled. So we looked at that and said</p> <p>15 how do we make sure that we build a system that</p> <p>16 helps get rid of that type of terrible</p> <p>17 behavior. I mean, that was horrible.</p> <p>18 Q. When you talked with Mr. Rudolph,</p> <p>19 did you discuss whether you could develop</p> <p>20 something to get files to the cloud without</p> <p>21 using standard copying methodology?</p> <p>22 A. Yes, we did.</p> <p>23 Q. And what do you recall him advising</p> <p>24 you about in that respect?</p> <p>25 MR. ADELMAN: Objection to form.</p>
Page 80	Page 81
<p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>

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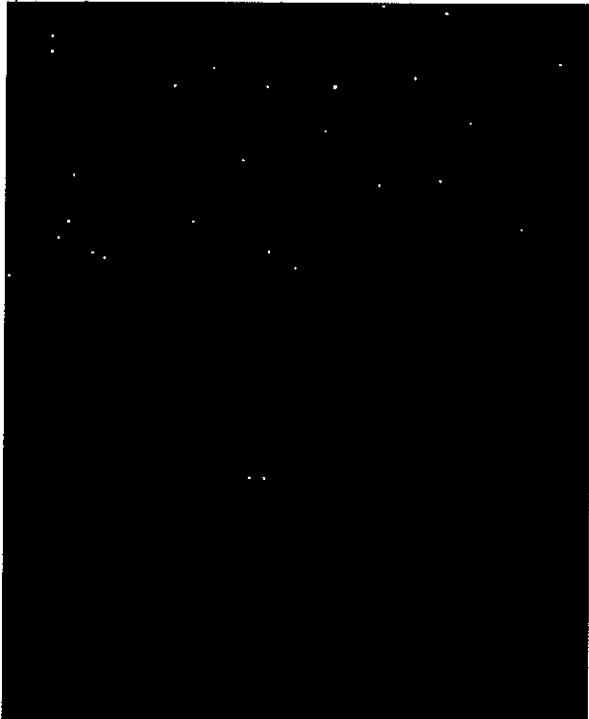

<p style="text-align: right;">Page 86</p> <p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 A. Because you are defining iTunes as a</p> <p>3 master -- iTunes is a file sharer, but they are</p> <p>4 legalized by the record labels. They have a</p> <p>5 master that they continually cut files from, so</p> <p>6 if you told them, iTunes, they would only have</p> <p>7 one copy they could sell, which actually might</p> <p>8 be a good idea for the record labels, because</p> <p>9 it creates scarcity, but let's just say, you</p> <p>10 know, that you continue with the file share</p> <p>11 mentality of an Apple that's legalized by</p> <p>12 contract, then, of course, it will always stay</p> <p>13 there. But if iTunes only had one file to sell</p> <p>14 and they sold that to someone, they would not</p> <p>15 maintain a source file. They are only</p> <p>16 maintaining a source file because they are</p> <p>17 authorized to do that in their file share</p> <p>18 system.</p> <p>19 Q. I am not asking about why they are</p> <p>20 doing it, though. I am trying to ask about</p> <p>21 technologically what happens.</p> <p>22 A. Well, you are comparing us to</p> <p>23 iTunes. You are saying since iTunes still has</p> <p>24 a source copy. They have a source copy for a</p> <p>25 different reason.</p>	<p style="text-align: right;">Page 87</p> <p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p> <p>2 Q. Right. I understand. They have a</p> <p>3 source copy because they want to continue to</p> <p>4 sell that file --</p> <p>5 A. Absolutely.</p> <p>6 Q. -- to lots of other people pursuant</p> <p>7 to authorization, and that's not what I am</p> <p>8 asking.</p> <p>9 What I am saying is because ReDigi</p> <p>10 doesn't want to do that, doesn't it have to do</p> <p>11 something different from iTunes to ensure that</p> <p>12 the file is no longer on the user's hard drive?</p> <p>13 A. Yes.</p> <p>14 MR. ADELMAN: Objection to form.</p> <p>15 Q. What does it do?</p> <p>16 A. It migrates the file. It doesn't</p> <p>17 allow that file to stay on the user's computer.</p> <p>18 It picks it up packet by packet and moves it to</p> <p>19 the cloud.</p> <p>20 Q. That, what you have described, is</p> <p>21 the same thing as what iTunes does packet by</p> <p>22 packet; right?</p> <p>23 MR. ADELMAN: Objection to the form.</p> <p>24 A. But there is only one set of</p> <p>25 packets. iTunes has an infinite-set of</p>
<p style="text-align: right;">Page 88</p> 	<p style="text-align: right;">Page 89</p> <p>1 Ossenmacher - Confidential - Attorneys' Eyes Only</p>  <p>24 A. I may or may not have. I mean,</p> <p>25 Larry and I sit right next to each other in our</p>

EXHIBIT 12

In The Matter Of:
Capitol Records, LLC vs.
REDIGI, Inc.

Alasdair McMullan
June 20, 2012

Precise Court Reporting
200 Old Country Road
Suite 110
Mineola, New York 11501
516-747-9393 718-343-7227 212-581-2570

Page 1	Page 3
<p>1 2 UNITED STATES DISTRICT COURT 3 SOUTHERN DISTRICT OF NEW YORK 4 -----X 5 CAPITOL RECORDS, LLC, 6 Plaintiff, 7 -against- Civil Action No. 8 REDIGI INC., 12 CIV 0095 (RJS) 9 Defendant. 10 -----X 11 140 East 45th Street 12 New York, New York 13 14 June 20, 2012 15 10:14 A.M. 16 17 DEPOSITION of ALASDAIR MCMULLAN, 18 taken pursuant to the Federal Rules of Civil 19 Procedure, and Notice, held at the 20 above-mentioned time and place before Edward 21 Leto, a Notary Public of the State of New 22 York. 23 24 25</p>	<p>1 2 IT IS HEREBY STIPULATED AND 3 AGREED by and among counsel for the 4 respective parties hereto, that the filing, 5 sealing and certification of the within 6 deposition shall be and the same are hereby 7 waived; 8 IT IS FURTHER STIPULATED AND 9 AGREED that all objections, except to the 10 form of the question, shall be reserved to 11 the time of the trial; 12 IT IS FURTHER STIPULATED AND 13 AGREED that the within deposition may be 14 signed before any Notary Public with the 15 same force and effect as if signed and sworn 16 to by the Court. 17 18 19 20 21 22 23 24 25</p>
Page 2	Page 4
<p>1 2 APPEARANCES: 3 4 COWAN, LIEBOWITZ & LATMAN, P.C. 5 Attorneys for Plaintiff 6 1133 Avenue of the Americas 7 New York, New York 10036 8 BY: JONATHAN Z. KING, ESQ. 9 -and- 10 RICHARD MANDEL, ESQ. 11 12 MEISTER SEELIG & FEIN LLP 13 Attorneys for Defendant 14 140 East 45th Street 15 New York, New York 10017 16 BY: GARY ADELMAN, ESQ. 17 18 19 ALSO PRESENT 20 Brad Cohen 21 Larry Rudolph 22 John Ossenmacher 23 Mike Walker 24 Sarah Matz 25</p>	<p>1 A. McMullan 2 ALASDAIR MCMULLAN, having 3 first been duly sworn by a Notary Public of 4 the State of New York, was examined and 5 testified as follows: 6 EXAMINATION BY 7 MR. ADELMAN: 8 Q. Please state your name for the 9 record. 10 A. Alasdair McMullan. 11 Q. What is your business address? 12 A. 150 Fifth Avenue, New York, New 13 York 10011. 14 MR. ADELMAN: As in Mr. Piibe's 15 deposition, we'll designate the entire 16 deposition as attorneys eyes only 17 subject to a subsequent review pursuant 18 to the protective order for the 30 day 19 period. 20 Good morning, Mr. McMullan. 21 THE WITNESS: Good morning. 22 MR. ADELMAN: My name is Gary 23 Adelman. I'm the attorney for ReDigi, 24 Inc. in a matter captioned Capitol 25 Records, LLC versus ReDigi. Have you</p>

Page 125

1 A. McMullan
2 A. What's the question?
3 Q. Has anyone at Capitol hired
4 someone outside of Capitol to analyze the
5 tracks in any way?
6 A. Not that I know of.
7 Q. Other than your legal degree, do
8 you have any other degrees?
9 A. I have an undergraduate degree.
10 Q. And other than that, undergrad,
11 legal degree, any other degrees?
12 A. No.
13 Q. To your knowledge, has anyone at
14 Capitol reviewed ReDigi's code?
15 A. To my knowledge, no.
16 Q. If you can turn back to your
17 Declaration.
18 A. Exhibit-G?
19 Q. Yes. Sorry. Exhibit-G. Thank
20 you. Paragraph 14, the last sentence says
21 "both storage and downloading again
22 presuppose the making of copies of the file
23 that resided on the original user's
24 computer." How do you know that?
25 A. Because the file resides on the

Page 126

1 A. McMullan
2 original user's computer and a copy of it
3 then appears on the ReDigi server, and then
4 if someone downloads it to their computer, a
5 copy of it appears on their hard drive. So
6 three copies now have existed. So that's
7 the sine qua non of copying under the
8 Copyright Act.
9 Q. But you haven't looked at the
10 system and you don't have a degree in
11 computer science, so how do you know that
12 copies are being made?
13 A. You need neither of those things
14 because it's a Copyright Law definitional
15 issue. If there's a copy resident on one
16 material object and that copy then ends up
17 resident on another material object, there
18 has been a copy made.
19 Q. And where in the Copyright Law
20 does it say that?
21 MR. MANDEL: Objection.
22 A. I mean if you have a copy of that
23 Copyright Act, I can point you to it.
24 (Copy of Copyright Act was marked
25 as Defendant's Exhibit-J for

Page 127

1 A. McMullan
2 identification; 6/20/12, E.L.)
3 Q. Exhibit-J that I'm handing you is
4 the complete copy of the Copyright Act, by
5 Counsel.
6 A. So the definition of copy says
7 it's a material object in which a work is
8 fixed by any method.
9 Q. But where does it say that when a
10 file is moved, that it goes from one
11 material object to another, where is that in
12 the Copyright Law?
13 MR. MANDEL: Objection. Calls
14 for a legal conclusion.
15 Mischaracterizes the testimony.
16 MR. ADELMAN: I think we're a
17 little beyond that.
18 MR. MANDEL: We're way beyond
19 frankly getting into an area --
20 MR. ADELMAN: He said if I have
21 the Copyright Law, he'll point to it.
22 MR. MANDEL: My problem is
23 you're asking for legal analysis.
24 MR. ADELMAN: The point is
25 made. That's fine.

Page 128

1 A. McMullan
2 MR. MANDEL: The point is
3 nothing.
4 MR. ADELMAN: The point has
5 been made.
6 A. Is there a question or not?
7 Q. No. There's no question. You've
8 answered my question. Thank you.
9 A. For the record, I never did
10 answer the last question.
11 Q. Okay.
12 MR. MANDEL: If you want to
13 complete your answer.
14 THE WITNESS: I only take
15 exception to his statement that I
16 answered the question. I'm just saying
17 I did not.
18 Q. Okay. So you're free to answer.
19 I'm not stopping you.
20 A. Can you read back the last
21 question?
22 MR. MANDEL: Can you read it
23 back.
24 MR. ADELMAN: Yes. Read it
25 back.

Page 129

1 A. McMullan
2 (The requested portion was read.)
3 MR. MANDEL: You can answer,
4 subject to my objection.
5 A. I take issue with your statement
6 that anything is moved. What it says is
7 that a copy is something that's fixed in a
8 material object, and your hypothetical or
9 your explanation explained that there were
10 three different material objects. So by
11 definition, copies had to have been made
12 because you couldn't end up with three
13 different material objects fixing the same
14 work unless copies were made. And that's
15 the sine qua non of copyright infringement,
16 because there was no permission to allow it
17 to happen on the ReDigi system.
18 Q. Just for the record, I didn't say
19 there were three material objects, you did.
20 A. Correct.
21 Q. So in your own hypothetical,
22 you're assuming that each piece of hardware
23 is a material object; is that correct? Or
24 you're stating it, you're not assuming. I'm
25 sorry, you don't like the word "assume."

Page 130

1 A. McMullan
2 A. Each disc where the work is fixed
3 is a material object.
4 Q. Okay. Thank you.
5 MR. ADELMAN: Off the record.
6 (A discussion was held off the
7 record.)
8 Q. This has been previously marked
9 as Exhibit-21.
10 A. (Reviewing). Okay.
11 Q. And do you recognize this
12 document?
13 A. Yes.
14 Q. And can you identify it?
15 A. It's a letter from Jennifer
16 Pariser to John Ossenmacher.
17 Q. And this letter is on behalf of
18 Universal Music, SONY Music Entertainment,
19 Warner Music Entertainment and EMI Music
20 North America, correct?
21 A. Yes. Well, yes.
22 Q. That's what it says here?
23 A. No. That's right.
24 Q. And to your knowledge, did all
25 four of the majors request that Jennifer

Page 131

1 A. McMullan
2 Pariser send this letter?
3 MR. MANDEL: I'm going to
4 object to the extent it gets into
5 attorney/client communications.
6 Q. Have you ever spoken to
7 Universal, SONY or Warner about this case,
8 or about ReDigi I should say?
9 MR. MANDEL: Outside the
10 context of legal discussions through
11 the legal group of the RIAA?
12 MR. ADELMAN: Well, that's
13 in-house communications with outside --
14 that's not privileged.
15 MR. MANDEL: Our position is
16 there's a joint privilege shared by the
17 record companies and the RIAA.
18 MR. ADELMAN: I'd like to see
19 some joint defense letter or something
20 like that that states that.
21 MR. MANDEL: There's no need
22 for a joint letter.
23 MR. ADELMAN: Anyway, you can
24 make your objection.
25 A. What's the question?

Page 132

1 A. McMullan
2 Q. The question is, did you have
3 conversations with Universal, SONY or Warner
4 concerning ReDigi?
5 MR. MANDEL: You can answer yes
6 or no.
7 A. Yes.
8 Q. Who at SONY Music did you have a
9 conversation with about ReDigi?
10 A. I don't recall.
11 Q. What about Universal, who at
12 Universal Music did you have a conversation
13 about ReDigi?
14 A. I don't recall.
15 Q. If I said Harvey Geller, would
16 that refresh your recollection?
17 A. I just don't recall if it was him
18 or somebody that worked for him.
19 Q. How about Warner Music?
20 A. I think it was Tucker McCrady.
21 Q. So what does the RIAA do for
22 Capitol Music, or EMI Music North America?
23 A. The RIAA is a trade association.
24 It performs a number of functions. Most
25 relevant to me, there's a committee of

EXHIBIT 13

Capitol with ownership of the common law copyrights in such works. See McMullan Decl. ¶ 6. The Pre-1972 Recordings are subject to protection under state law rather than federal copyright law, and the Copyright Act cannot be used to “annul[] or limit[]” those rights “until February 15, 2067.” 17 U.S.C. § 301(c). See also Naxos, 4 N.Y.3d at 556 n. 8.

2. ReDigi Violates Capitol's Exclusive Rights in the Works

The Copyright Act provides the owner of a copyright with certain exclusive rights, including the right to reproduce the copyrighted work in copies or phonorecords, to distribute copies or phonorecords of the copyrighted work to the public, to display the copyrighted work publicly and (in the case of sound recordings), to perform the copyrighted work publicly by means of a digital audio transmission.² 17 U.S.C. §§ 106(1), (3), (5), (6). As set forth below, ReDigi, without authorization from Capitol, violates each of these exclusive rights.

(a) ReDigi Reproduces the Works in Copies

ReDigi's comprehensive infringement of Capitol's copyrights begins with violation of Capitol's exclusive right to “reproduce” the Copyrighted Recordings in “copies.” Although the ReDigi website cryptically claims that its “genius” is “to facilitate the transfer of a digital music file from one user to another without copying or file sharing,” see McMullan Decl. Ex. 2, the entire service and business model are, by ReDigi's own admission, predicated upon making multiple, unauthorized copies of sound recordings, including the Copyrighted Recordings and Pre-1972 Recordings owned by Capitol.

² Although sound recordings are technically fixed in “phonorecords” rather than “copies” under the definitions of § 101, there is no material distinction between the two terms for purposes of this action and accordingly the term “copies” will be used here throughout for ease of reference in identifying the material objects in which any copyrighted works, including the sound recordings at issue, are embodied.